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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Worcester County, Maryland has always used at-large elections for its Board of Commissioners. Respondents alleged that this electoral system violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, by diluting minority voting strength. The district court agreed, citing Respondents' evidence that it was possible to draw a single-member district with a black voting age population majority. Respondents' profferred districting plans, however, segregated voters by race and subordinated the County's race-neutral interests in countywide representation and preservation of municipal boundaries; indeed, Respondents admitted that their plans were intentionally drawn on racial lines. The Fourth Circuit affirmed, reasoning that Respondents' proposed districts did not "ignore" traditional districting criteria and were not "bizarre" in shape. The Fourth Circuit reversed the district court's chosen remedy, however, without holding any of the district court's findings clearly erroneous. The Fourth Circuit then remanded with instructions to impose a race-based single-member districting plan, which had never been offered to the district court as a remedy, for use in special elections this fall. The questions presented are as follows:

1. whether, in light of this Court's ruling in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), a federal court may (a) hold a local government liable under § 2 based on districting plans that subordinate race-neutral redistricting principles to racial considerations, and (b) order such a plan to remedy the purported § 2 violation; and

2. whether a court of appeals may reverse a remedy order and impose a remedy never offered to the district court without determining that its findings were clearly erroneous.

PARTIES

The parties to this proceeding are Worcester County, Maryland; George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as Members of the Worcester County Board of Commissioners; George H. Dryden, Hinson Finney, and Mark Frostrom, as Members of the Worcester County Board of Election Supervisors; Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, and William Waters; the Worcester County Voting Rights Coalition; and the Worcester County Branch, NAACP; the Washington Legal Foundation *(amicus curiae)*; The Center For Voting And Democracy *(amicus curiae)*; the Republican National Committee *(amicus curiae)*; and the United States of America *(amicus curiae)*.

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OPINIONS BELOW

The district court's initial liability opinion is reported at 840 F. Supp. 1081 (D. Md. 1994) and reproduced below at Appendix ("App.") 1a-17a. The district court's first remedial opinion is reported at 847 F. Supp. 369 (D. Md. 1994) and reproduced at App. 18a-28a. The Fourth Circuit's first opinion is reported at 35 F.3d 921 (4th Cir. 1994) and reproduced at App. 29a-43a. This Court's denial of certiorari is reported at 115 S. Ct. 1097 (1995) and reproduced at App. 44a. The district court's second remedial opinion and order denying a stay pending appeal are reported at 874 F. Supp. 687 (D. Md. 1995) and 874 F. Supp. 695 (D. Md. 1995) and reproduced at App. 45a-57a and 58a-61a, respectively. The Fourth Circuit's second opinion is unreported, 57 F.3d 1065, 1995 WL 360787 (4th Cir. June 16, 1995) (table disposition) and is reproduced at App. 65a-72a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on June 16, 1995. Petitioners filed a Motion to Recall the Mandate and Stay Reissuance of the Mandate on June 30, 1995, which the Fourth Circuit denied on July 31, 1995. This Petition for a Writ of Certiorari is being brought to this Court within ninety (90) days of the judgment below, as required by S. Ct. R. 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). This Petition is not a Cross-Petition and Petitioners know of no party who intends to file such a Petition; thus, the provisions of S. Ct. R. 12.3 do not presently apply.

STATUTORY PROVISIONS INVOLVED

This appeal involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (1994 Supp.). The text of this statute is set forth at App. 83a.

STATEMENT OF THE CASE

On June 16, 1995, the Fourth Circuit directed the district court to replace Worcester County, Maryland's at-large system for elections of its Board of Commissioners with a racially motivated single-member districting plan proposed by Respondents. App. 72a. The Fourth Circuit reached this conclusion over the County's repeated objections -- at the liability and remedy phase, at trial and on appeal -- that Respondents' plans, whether offered to prove the County's liability under § 2 or as a proposed remedy for the alleged violation, conflict with the Equal Protection Clause because of their excessive reliance on racial considerations.

A. The County's At-Large Election System

Worcester County, Maryland ("County") is governed by a five-member Board of Commissioners ("Board"). App. 2a. When Respondents brought this action in 1992, Board members were elected at-large in county-wide elections. App. 19a. Four of the five Board members were required to reside in specified residency districts, each of which contained one of the County's major municipalities; no municipality was

split by residency district boundaries. The fifth Board member was not required to reside in any specific district.[1] App. 19a. By combining residency districts with at-large elections, the County thus balanced its interest in geographical diversity (*i.e.*, ensuring that individual municipalities' diverse interests are represented on the Board) with an interest in countywide representation (*i.e.*, ensuring that Board members did not ignore the concerns of County residents outside their home areas). App. 42a.

B. The Liability Trial

Respondents Honiss W. Cane, Jr. *et al.* -- African-American residents of the County and local civil rights organizations -- filed suit against the County's at-large system in November 1992, alleging that it violated § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973 (1994 Supp.) by diluting minority voting strength. At trial in November 1993, Respondents presented the district court with two race-based, single-member districting plans to prove that the minority population in the County was sufficiently large and geographically compact to support creation of a single-member district with a black voting age population ("BVAP") majority, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986).[2] These plans, known as "Plan A" and

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[1] During the course of this litigation, the County created a fifth residency district to reflect the development of a fifth population center. As a result, each of the five Board members must reside in a specified residency district. App. 19a.

[2] *Gingles* established that § 2 plaintiffs must prove three "preconditions:" (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the

(Footnote continued)

"Plan B," both purposefully segregated citizens into separate districts on the basis of race, as Respondents' expert admitted at trial:

> Q [By Mr. Griffith, co-counsel for the County]: Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed BVAP-majority district], would it be fair to say that what you have done is, you have linked together the black concentrations in these three non-contiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> By Mr. Cooper: Well, obviously, that's what we've done.

App. 84a.[3]

Based on this testimony, the contorted shape of the proposed BVAP-majority districts in Respondents' plans, and

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(Footnote continued)
majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Id.* at 50-51.

[3] The only practical difference between the two plans is that Plan A, which contains a 62.1% BVAP district, divides three County municipalities, whereas Plan B, which contains a 57.8% BVAP district, divides only two. Maps of these plans are being lodged separately with the Court. Respondents also offered a third plan containing seven districts, two of which had BVAP majorities.

their disregard for the County's traditional redistricting principles of countywide representation and preservation of municipal boundaries, the County argued that Respondents' plans violated *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993), which held that districts violate the Constitution when they are "so extremely irregular on [their] face that [they] rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[4]

On January 7, 1994, the district court ruled that the County's at-large electoral system violated § 2 of the VRA. App 15a-16a. Notwithstanding the County's objections that Respondents' proposed plans violated *Shaw*, the district court concluded that the minority community was sufficiently large and geographically compact to create a district with a BVAP majority (the first *Gingles* precondition described *supra*, note 2). The district court held that this finding, in conjunction with the other *Gingles* preconditions and a review of the "totality of circumstances," justified invalidating

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[4] As this Court explained in *Shaw* (113 S. Ct. at 2827),

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

the County's at-large system for Board elections as a violation of § 2. App. 15a-16a. As a remedy, the court imposed a cumulative voting system for Board elections. App. 28a.[5]

C. The First Appeal (§ 2 Liability)

On September 16, 1994, the Fourth Circuit affirmed on the issue of liability, agreeing that Respondents' proposed BVAP-majority districts were sufficiently compact to satisfy *Gingles*. App. 38a. In affirming, the Fourth Circuit rejected the County's argument that Respondents' plans could not be a basis for § 2 liability because they violated this Court's holding in *Shaw*. Instead, the Fourth Circuit interpreted that case as holding that race-conscious redistricting "constitutes impermissible race discrimination only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 38a n.6 (citing *Shaw*, 113 S. Ct. at 2827).

The Fourth Circuit, however, reversed the district court on the issue of remedy, holding that, in ordering cumulative voting, the district court had inadequately deferred to the County's legitimate interest in structuring its local government. App. 42a. Consequently, the Fourth Circuit

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[5] Under a cumulative voting system, each voter may cast as many votes as there are offices to be filled and may, depending on his/her personal preferences, cast some, all, or none of these votes for a particular candidate, thereby enabling racial and political minority groups to obtain a share of the seats in a governing body more nearly proportional to their share of the population than conventional electoral systems. *See, e.g.*, Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135, 1136, 1139 (1993).

remanded the case to the district court with instructions to give the County an opportunity to submit a remedial plan of its choosing. App. 43a.[6]

D. Proceedings On Remand

On remand, the County offered three plans, including its at-large system and a single-member districting plan that divided no municipalities and created a 44% BVAP district.[7] Respondents offered just one plan as a proposed remedy, Plan A, which divided three municipalities and featured a 62.1% BVAP majority district. Following an evidentiary hearing, the district court ordered that primary elections be held under the County's single-member districting plan, finding that this plan offered the black community an equal opportunity to elect a candidate of its choice in the Democratic primary. App. 55a.

The district court also held, however, that the County's plan would not provide a similar opportunity for the black community in the general election and, therefore, could not be implemented for that election. The district court also declined to impose Respondents' proposed Plan A for the general election in light of the County's concerns that the plan unnecessarily divided municipalities and encouraged racial polarization. App. 54a-55a. Instead, the district court once again imposed a cumulative voting system for Board general

[6] The Fourth Circuit also stayed the regularly scheduled 1994 Board elections pending resolution of Respondents' challenge.

[7] This plan was offered solely to respond to the directives of the Fourth Circuit and the district court. App. 84a (testimony of Commissioner John E. Bloxom) . The plan took race into account, but sought to do so in a manner consistent with the County's interest in preserving municipalities.

elections. App. 55a.[8] The district court ordered special elections using this plan, with a primary in September 1995, and a general election in November 1995. Both parties appealed to the Fourth Circuit.

E. The Second Appeal

On June 16, 1995, the Fourth Circuit issued an opinion affirming in part, vacating in part, and remanding the case to the district court. App. 65a. The Fourth Circuit agreed that the County's plan should not be used for general elections. App. 72a. Without identifying any error on the part of the district court, much less a clearly erroneous factual finding, the Fourth Circuit apparently rejected the use of the County's plan in the primaries as well.[9] The Fourth Circuit also rejected the use of cumulative voting. The opinion directed the district court to impose on remand a single-member districting plan (Plan B) that Respondents had offered as a remedy for the first time during appellate oral argument.[10]

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[8] Because of the effect of the order on its local governmental structure, the County asked the district court to stay the order; the request was denied. App. 64a. The County then applied to the Fourth Circuit for a stay of the judgment pending appeal on the same grounds. The Fourth Circuit held the motion in abeyance; after oral argument of the appeal, the County renewed its motion to stay, which the Fourth Circuit denied on June 16, 1995. App. 75a.

[9] This reading of the Fourth Circuit's opinion is also that of the district court. Its order on remand imposes the Fourth Circuit's chosen remedy for both the primary and the general election. App. 78a.

[10] This plan was one of the two racially motivated plans presented to the district court at the liability phase to prove the first *Gingles* precondition; however, this plan was never proposed to the

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App. 71a-72a. Plan B features a district that stretches almost the entire length of the County, dividing two municipalities in the process, for the purpose of achieving a 57.8% BVAP majority. The Fourth Circuit further ordered that its mandate issue "forthwith" so that the court-ordered special elections could go forward as scheduled. App. 72a.

F. The County's Petition For Recall Of The Fourth Circuit's Mandate

On June 28, 1995, the district court entered an order implementing the Fourth Circuit's plan. App. 78a. On June 29, 1995, this Court issued its decision in *Miller v. Johnson*, holding unconstitutional plans that subordinate race-neutral redistricting principles to racial considerations, unless narrowly tailored to further a compelling governmental interest. 115 S. Ct. 2475 (1995). The next day, the County filed a motion asking the Fourth Circuit to recall and stay reissuance of its mandate, especially in light of *Miller*. The Fourth Circuit denied the motion, 2-1, on July 31, 1995. App. 81a-82a. An application for a stay of the Fourth Circuit's judgment pending certiorari was denied by Chief Justice Rehnquist on August 15, 1995.

(Footnote continued)
district court as a remedy. A complete listing of the census units in each district in Plan B is being lodged separately with this Court, together with maps of Plans A and B.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF OVERRIDING NATIONAL IMPORTANCE

This case presents an issue of overriding importance, not just to the County, but to state and local governments across the country.[11] The County's at-large election system -- a system similar to those in place in 60% of cities nationwide[12] -- has been invalidated by a court relying upon two redistricting plans which, had the County enacted them in the first instance, would have violated the standards set forth in *Miller*. Furthermore, the Fourth Circuit's chosen remedy -- one of the race-based plans advanced to prove liability -- also violates *Miller*.

As Justice Blackmun explained in his concurring opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), "special circumstances are presented when a District Court 'reapportions' a municipal government by altering its basic structures." *Id.* at 81. Indeed, "even a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take." *Id.* at 81-82.

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[11] As of January 1992, there were 84,955 units of local government below the state level. These included 3,043 county governments, 19,279 municipal governments, 16,656 town or township governments, 14,422 school district governments, and 31,555 special district/special purpose local government districts. U.S. Bureau of the Census, *1992 Census of Governments*, Vol. 1, Government Organization, No. 1, at v. (Mar. 1994).

[12] *See Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994) (Thomas, J., concurring).

The decisions of the Fourth Circuit here do not merely make "a temporary alteration" in the County's "long-established form of [local] government." Instead, they "alter[] its basic structures." They not only effectively end the County's practice of protecting municipal boundaries and providing for countywide representation on the Board, but for the first time make race the overriding qualification for election to a seat on the Board. Thus, the system imposed by the Fourth Circuit not only changes the County's tradition of county-wide elections but, as the County shows *infra*, also violates *Miller*. Moreover, because the County's at-large system "is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation," *id.* at 60 (plurality opinion), the Fourth Circuit's decisions, if upheld, will have serious consequences across the country.

Accordingly, the Court should grant certiorari to clarify that at-large election systems do not violate the VRA when the only proof of a sufficiently numerous and geographically compact minority community, which this Court in *Gingles* deemed a "precondition[]" to § 2 liability, is a plan that subordinates traditional redistricting principles to racial considerations. Furthermore, the Court should prohibit lower courts from replacing at-large systems with remedial plans that violate *Miller*. Finally, the Court should require that an appellate court reviewing findings of vote dilution reverse them only when it expressly holds that they were clearly erroneous.

II. THE JUDGMENT BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *MILLER*

This Court should grant certiorari and reverse the judgment below because the Fourth Circuit's decisions violate the standards set forth in *Miller*. In that case, the Court held that a redistricting plan violates the Constitution when race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," unless the plan is narrowly tailored to further a compelling governmental interest. 115 S. Ct. at 2488. To prove a plan unconstitutional under *Miller*, a plaintiff must show that the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*[13] *Miller* does not require a threshold showing that the challenged district is bizarrely shaped. *Id.* at 2486. To the contrary, "evidence

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[13] In determining whether a district recognizes communities of interest, a legislature may not assume that "individuals of the same race share a single political interest. The view that they do is 'based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens,' the precise use of race as a proxy the Constitution prohibits." *Miller*, 115 S. Ct. at 2487 (citation omitted). The Court explained that

> [s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its

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other than a district's bizarre shape can be used to support" a claim that race was the predominant factor in drawing the district. *Id.* at 2487.

Applying these principles, the Court in *Miller* invalidated a majority-minority congressional district that stretched more than 260 miles across Georgia, "connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County," including portions of the City of Savannah. *Id.* at 2484. The district "'split[] eight counties and five municipalities along the way.'" *Id.* (citations omitted).

The Fourth Circuit's decisions here on liability and remedy both contravene the holding of *Miller*.[15] In affirming

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(Footnote continued)

> own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."

Id. at 2486.

[15] Although this Court denied certiorari from the Fourth Circuit's previous decision affirming the district court's liability holding, denial of certiorari at the interlocutory stage of a proceeding is without prejudice to the renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949). The County has preserved below its objection to the holding of liability; therefore, this Court may properly review that objection here. *See* Transcript, Remedial Hearing, *Cane et al. v. Worcester County et al.*, No. 92-CV-3226, at 4 (D. Md. Dec. 2, 1994) (reproduced at App. 85a); Brief of Appellants/Cross-Appellees Worcester County *et al.*, *Cane et al. v. Worcester County et al.*, Nos. 95-1122,

(Footnote continued)

the district court's determination of liability under the VRA, the Fourth Circuit held that race-conscious redistricting violates the Constitution "only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 38a n.6 (emphasis added). Under *Miller*, however, geographical "bizarreness" is not a prerequisite to a constitutional violation. 115 S. Ct. at 2486-88. Moreover, under *Miller*, the test is not whether a plan "ignores" traditional redistricting principles but, rather, whether it "subordinate[s] . . . traditional race-neutral districting principles . . . to racial considerations." *Id.* at 2488. *See also id.* at 2499-500 (Ginsburg, J. dissenting) ("'strict scrutiny' will be triggered not only when traditional districting practices are abandoned, but also when those practices are 'subordinated to' -- given less weight than -- race").

Here, there can be no doubt that racial considerations dominated the plans the lower courts relied upon in holding that Respondents had established a § 2 violation. As Respondents' own expert admitted at trial, these plans were *intentionally* drawn on racial lines to segregate voters into different districts for the purpose of creating a district with a BVAP majority. App. 84a (Cooper testimony). These plans reflect the assumption -- expressly rejected in *Shaw* and *Miller* -- that black voters in Worcester County constitute a community of interest simply because of their race. *See* App. 6a ("[t]he plan merely affirms the existing racial divisions in the County"). Thus, Respondents' *entire* case rests on plans that violate *Miller*. Indeed, had the County enacted either of

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(Footnote continued)
95-1688, at 16 n.19 (4th Cir. Apr. 12, 1995) ("[W]e wish to preserve our argument that the Appellants have no liability under § 2.").

Respondents' plans, it would have been subject to a challenge under *Miller* because of the overwhelming racial motivation present in each plan. As a result, neither plan is a proper foundation for a holding that Respondents satisfied the first *Gingles* precondition of a sufficiently numerous, geographically compact minority population. Therefore, the liability holding itself is defective because it relied on plans that violate *Miller*.[16]

Because the liability holding violated *Miller*, the race-based plan the Fourth Circuit imposed as a remedy likewise must fail. *See Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (absent proof of the *Gingles* preconditions, "there neither has been a wrong nor can [there] be a

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[16] Of course, under *Miller*, a race-based plan can be implemented if narrowly tailored to further a compelling governmental interest. 115 S. Ct. at 2490. No such showing has been, or could be, made here. The only possible governmental interest here is compliance with the VRA; however, as the County has noted repeatedly, that interest is absent because Respondents cannot satisfy the *Gingles* preconditions to § 2 liability. As *Miller* holds:

> [C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. The congressional plan challenged here was not required by the [VRA] under a correct reading of the statute.

115 S. Ct. at 2491 (citing *Shaw*, 113 S. Ct. at 2830-31). *See also Growe v. Emison*, 113 S. Ct. 1075, 1085 (1993) (invalidating judicially-imposed majority-minority district because "the *Gingles* preconditions were not only ignored but were unattainable").

remedy"). But, even assuming *arguendo* that the Fourth Circuit's liability holding did not violate *Miller*, the use of Plan B as a remedy would still be improper, because federal courts have less freedom to impose race-based remedies for violations of the VRA than do state and local legislatures. *See Shaw v. Hunt*, 861 F. Supp. 408, 434 n.21 (E.D.N.C. 1994) (three-judge court), *prob. juris. noted*, 115 S. Ct. 2639 (1995). Here, the Fourth Circuit's imposition of Respondents' alternative plan (Plan B) as a remedy violates *Miller* because this plan intentionally segregates voters into separate districts on the basis of race.[17] Plan B features a district that stretches almost the entire length of the County, splitting two municipalities in the process, for the purpose of achieving a 57.8% BVAP majority. It is at least as non-compact as the plan struck down in *Miller*. *Compare* Plan B (lodged separately with this Court) *with Miller*, 115 S. Ct. at 2496, 2503. App. B. The Fourth Circuit plan thus "subordinate[s] traditional race-neutral districting principles,

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[17] Nor is Plan B insulated from an equal protection challenge simply because a private actor, Respondents' expert, drew it. Because a plan becomes a governmental act once the County implements it, the County would violate the Constitution were it to implement Respondents' impermissibly racially motivated plan. In fact, *Miller* invalidated a plan drafted by the American Civil Liberties Union (ACLU) and then enacted, with modifications, by the Georgia General Assembly. 115 S. Ct. at 2484 (discussing the drafting and enactment of ACLU's "max-black" plan). In this case, the Fourth Circuit directly imposed Respondents' Plan B. If a private actor's plan subsequently enacted by a legislature can violate *Miller*, then it follows (given the limited freedom courts have to fashion remedies) that judicial imposition of an impermissibly racially motivated, albeit privately drawn, plan must also be unconstitutional under *Miller*. *Cf. Shelley v. Kramer*, 334 U.S. 1 (1948) (prohibiting judicial enforcement of private, racially restrictive covenants as "state action" within reach of the Fourteenth Amendment).

including . . . compactness . . . [and] respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 115 S. Ct. at 2488.

In short, the Fourth Circuit used Respondents' plans both to invalidate the County's at-large election system and replace it with a racially motivated single-member districting plan. If the County were to enact these plans, they would contravene this Court's ruling in *Miller*, and therefore the Fourth Circuit should not be permitted to force the County to implement them. Accordingly, this Court should grant certiorari to resolve the conflict between *Miller* and the judgment below.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS FOR APPELLATE REVIEW OF DISTRICT COURTS' FACTUAL FINDINGS IN VOTING RIGHTS CASES

This Court should also grant certiorari because the Fourth Circuit failed to apply the "clearly erroneous" standard of review to the district court's findings of fact regarding remedy. Instead, the Fourth Circuit substituted its own judgment based upon matters not raised before the district court at the remedy hearing.

This Court held in *Gingles* that a district court's factual findings in a § 2 case should be reviewed under the "clearly erroneous" standard:

> [T]he clearly erroneous test of [Fed. R. Civ. P.] 52(a) is the appropriate standard for appellate review of a finding of vote dilution . . . . [T]he trial court is to consider the "totality of circumstances" and to determine, based "on a searching practical evaluation of 'past and present

> reality,'" whether the political process is open to minority voters . . . . [T]he application of the clearly-erroneous standard to ultimate findings of vote dilution [thus] preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

Gingles, 478 U.S. at 79 (citations omitted). Under this standard, a reviewing court cannot reverse simply because it is convinced it would decide the case differently from the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Here, the district court found that the County's plan containing the 44% BVAP district would satisfy the VRA with respect to the Democratic primary election. App. 56a. Under this plan, the district court found, "African-American voters of the County will have an opportunity to elect a candidate of their choice [in the primary], but that opportunity will not come at the expense of geographical diversity, the division of municipalities, or racial segregation." *Id.* The Fourth Circuit apparently reversed on this point without an explanation of why the district court's findings were clearly erroneous; indeed, there was no statement at all by the Fourth Circuit that *any* of the district court's factual findings were erroneous.[18]

[18] The Fourth Circuit's opinion also conflicts with Fifth Circuit precedent requiring a district court in a § 2 case to support its decision with particularized findings of fact to facilitate appellate review. *See, e.g., Velasquez v. City of Abilene*, 725 F.2d 1017, 1020-1021 (5th Cir. 1984) (finding that trial court must discuss substantial contrary evidence so that appellate court can evaluate the thought processes of the court below). Just as the district court must explain its consideration of the evidence, so too must an

(Footnote continued)

The Fourth Circuit also ordered implementation of Respondents' Plan B, finding that this plan would provide minority voters with the opportunity to elect candidates of their choice. App. 71a-72a. The district court, however, was *never* presented with this plan as a possible remedy.[19] Thus, the Fourth Circuit improperly substituted its judgment regarding an appropriate remedy for that of the court below, without according the lower court the initial opportunity to consider Plan B as a remedy. The Fourth Circuit's invalidation of the County's at-large system in favor of Respondents' Plan B -- without an opportunity for the district court to apply its "particular familiarity with the indigenous political reality" -- thus conflicts with this Court's standards for appellate review of vote dilution decisions set forth in *Gingles*, 478 U.S. at 79-80. Consequently, this Court should grant certiorari to resolve the conflict.

(Footnote continued)
appellate court explain why a district court's findings were clearly erroneous. Without such an explanation, this Court is "unable to determine from a silent record the thought processes of the court below." *Id.* at 1021. This Court, therefore, should grant certiorari in this case in part to resolve this conflict between the Circuits.

[19] Respondents offered only one plan at the remedial hearing: Plan A, which featured a 62.1% BVAP-majority district. App. 85a (remedial hearing). Plaintiffs' alternative Plan B, which contained a 57.8% BVAP district, was offered only during the liability phase of the trial for the limited purpose of demonstrating that the minority community was "sufficiently large and geographically compact" to justify creation of a single-member district, as required in *Gingles*, 478 U.S. at 50. This plan is not, however, automatically valid as a proposed remedy. *See Clark v. Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible.").

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Fourth Circuit's use of Respondents' racially motivated single-member redistricting plans to invalidate and replace the County's at-large election system. Failing that, the Court should withhold its disposition of this Petition pending the Court's decisions in *Shaw v. Hunt* and *Bush v. Vera, prob. juris. noted*, 115 S. Ct. 2639 (1995), which will likely shed further light on this case.

Dated: August 17, 1995

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civ. No. Y-92-3226.

Honiss W. CANE, Jr., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

DATE: Jan. 7, 1994.

OPINION

YOUNG, Joseph H., Senior United States District Judge.

Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr. and Saunders Marshall ("plaintiffs") have sued Worcester County, Maryland, George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Basett and Jeanne Lynch ("defendants"), and the Worcester County Board of Commissioners ("Board"), alleging that the system for electing members to the Board violates § 2 of the Voting Rights Act by discriminating against African-American voters.

Worcester County Government

Worcester County is a predominantly rural county located in the southeastern part of Maryland. It borders the states of Delaware and Virginia as well as the Atlantic Ocean. The County contains four incorporated towns: Berlin, Ocean City, Pocomoke and Snow Hill. According to the 1990 Census, Worcester County has an African-American population of 7,448 persons or 21.26% of the total population of 35,028 persons. The African-American voting age population of the County is 5,237 persons or 19.16% of the total voting age population of 27,331 persons. The African-American population is concentrated in four areas of the county: Pocomoke, Stockton, Snow Hill and Berlin.

The Board serves as the legislative and governing body of the County. Its members are elected at-large[1] under a residency district system. The entire electorate of Worcester County votes on candidates for each of the five seats. Four of the seats correspond to the County's residency districts. Candidates are required to reside in the appropriate district. The fifth member, the commissioner-at-large, must be a resident of the County, but is not subject to a district residency requirement. The five candidates who receive the most votes in the general election are elected to the Board.

The plaintiffs allege that the system for electing the Board violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982). Based on the theory of "vote dilution," the plaintiffs' claim alleges that under the current election system, the votes of African-American citizens are diluted when compared to the votes of the white majority.

---

[1] In an at-large election, the entire jurisdiction forms a single electoral district from which all the officials are chosen.

DISCUSSION

Section 2 of the Voting Rights Act provides:

> (a) No voting ... practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ...
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp.1991).[2]

[2] The Senate Judiciary Committee Report accompanying the bill which amended § 2 sets out factors which might be probative of a violation. The seven "typical factors" and two "additional factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used

The § 2 amendments make clear that a violation of the section can be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and establish that the relevant legal standard is the "results test." Under the results test, courts can invalidate "at-large" electoral systems if plaintiffs prove that the system operates to "dilute" the vote of minority voters, or limits their opportunity to participate in the political processes and to elect legislators of their choice. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). This test challenges those at-large systems which work to systematically exclude minority-preferred candidates, on the theory that in an at-large system, "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters."

> unusually large election districts, majority vote requirements, anti-single shot provision, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> 9. whether policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 97-417, 97th Cong.2d Sess. 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

Thornburg v. Gingles, 478 U.S. 30, 49, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986).

In setting forth the elements for a successful § 2 challenge, the plaintiffs must prove three preconditions: 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group is politically cohesive; and 3) the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51, 106 S.Ct. at 2766-67. Although these three factors are preconditions to a § 2 claim, "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by African-Americans and white voters to elect their preferred representative." *Id.* at 47, 106 S.Ct. at 2764.

A. Sufficiently Large and Geographically Compact

The first factor requires the minority group to prove that it is sufficiently large and geographically compact to create a majority, if it were voting in a single-member district. *Gingles*, 478 U.S. at 50, 106 S.Ct. at 2766. Plaintiffs have presented two alternative district configurations,[3] each having a majority African-American voting age population within a five-district plan.[4] The

[3] Plaintiffs also proposed a third district configuration with one majority African-American district within a seven-district plan. However, the Fourth Circuit has ruled that district courts should not change the number of members on a governing board if it is not necessary to create an African-American majority district. *Hines v. Ahoskie*, 998 F.2d 1266 (4th Cir.1993). Therefore, the third configuration will not be considered.

[4] The plaintiffs' proposed plans have one district with a majority African-American total population and a majority African-American voting age population:

African-American population is spread throughout several regions of the County, but it is concentrated in several small pockets which can be connected to create a district with a majority African-American voting age population of 58% to 62%. *See McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir.1988) (county's proposed remedial single member district plan contained seven districts, the two minority districts had 67.5% and 51.8% minority voting age populations and thus met the relevant standard); *Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir.1990), *cert. denied*, 498 U.S. 1023, 111 S.Ct. 670, 112 L.Ed.2d 663 (1991) (the evidence showed the African-Americans would constitute a majority of a district's voting age population); *Westwego Citizens for a Better Government v. Westwego*, 946 F.2d 1109, 1117 (5th Cir.1991) (proposed plan showed the district would have an African-American majority of 59.1% of the total population and an African-American voting majority of 52.8%).

The defendants claim that it is not possible to draw a district which contains an African-American voting majority that is reasonably compact and argue that such a district would be too winding and irregular in shape to be acceptable under the governing standards. However, compactness is a relative concept which must be interpreted in light of § 2's "laudatory national mission" of opening the political process to minorities. *See Dillard v. Baldwin County Bd. of Educ.*, 686 F.Supp. 1459, 1465-66 (M.D.Ala.1988); *Neal v. Coleburn*, 689 F.Supp. 1426, 1435 (E.D.Va.1988).

The plaintiffs' proposed Plan 1 is not unreasonably irregular in shape, considering the population dispersal within the County. The plan merely affirms the existing racial divisions in the County. While the plan does entail running the newly created districts across other voting district lines and through towns, this is unavoidable

	Total Black Population	Black Voting Age Population
Plan 1	65.1%	62.1%
Plan 2	60.0%	57.8%

because of the heavy white population and the need to achieve a majority African-American population in one of the districts. The districts may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors" nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering. They are in line with the configurations of electoral districts that have been approved in other cases.

B. Racially Polarized

Racially polarized voting represents "a consistent relationship between [the] race of the voter and the way in which the voter votes," *Gingles*, 478 U.S. at 46, n. 11, 106 S.Ct. at 2764 n. 11, and is politically or substantively significant if a cohesive minority electorate is typically unable to elect its preferred candidate in the face of majority opposition. *Id.* at 55, 106 S.Ct. at 2768. However, there is no simple doctrinal test for determining whether a certain level of racially polarized voting is legally significant. *Id.* at 57, 106 S.Ct. at 2769. "Discrete inquiries into minority and white voting practices" is necessary to determine whether a given district experiences legally significant racially polarized voting. *Id.* at 56, 106 S.Ct. at 2769.

1. Politically Cohesive

Plaintiffs must show that African-Americans are sufficiently cohesive in their voting behavior to be treated as a group with common political interests. To prove this, plaintiffs must show that "a significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769 (emphasis added).

At trial, the plaintiffs relied upon the testimony of Theodore S. Arrington, Ph.D., Professor of the Department of Political Science at the University of North Carolina. The Court qualified Dr.

Arrington as an expert to testify on voting behavior, political analysis, party politics and racial voting patterns. To counter Dr. Arrington's testimony, the defendants presented testimony from Ronald E. Weber, Ph.D., Professor of Government and Political Science at the University of Wisconsin. Dr. Weber was qualified as an expert to testify on political science, statistics, vote dilution, demography and political systems.

The experts used two methods for analyzing voting behavior in Worcester County: ecological regression analysis and homogeneous case analysis, both methods having been approved in *Gingles*, 478 U.S. at 52-53, 106 S.Ct. at 2767-68. Ecological regression analysis seeks to express the relationship between two variables: the votes for a given candidate and the percentage of African-Americans or whites in a precinct. Data points from each precinct are plotted on a graph known as a "scatterplot." The graph illustrates how the vote for a preferred candidate changes as the percentage of African-Americans or whites in the precinct rises. Both experts agreed that the estimates of voting cohesion among African-Americans are questionable because the nine, majority-white precincts must be used to project the voting behavior of African-Americans in Worcester County and because the scatterplot of those white precincts is truncated.

Homogeneous case analysis is used to validate the results of the ecological regression analysis. In homogeneous analysis, the actual vote is studied in precincts that are at least 90% or more of one race. Because there are no African-American majority precincts in Worcester County, neither expert could validate the results of the ecological regression analysis in determining minority cohesion.

The first election in Worcester County in which an African-American was a candidate for County Commission was in 1982. The statistical evidence shows that the African-American candidate received 49% of the African-American vote. Both experts agreed that such a showing by the African-American Community

for a first time minority candidate for County Commissioner was impressive, but disagreed on whether the showing was sufficient to demonstrate cohesion.[5]

The next County Commissioner election that included an African-American candidate was in 1986. The minority candidate, a Republican, received 62% of the African-American vote. Dr. Arrington testified that African-Americans generally vote for Democrats and this election showed cohesion because the minority community had to cross party lines to vote for its preferred candidate.

Finally, in the 1990 Democratic Primary for County Commissioner, District 1, the minority candidate received 40% of the African-American vote. The lay testimony at trial indicated this candidate did not attempt to win the election, making an analysis meaningless.

The derivative statistical evidence for projecting minority cohesion in Worcester County is not reliable because of the lack of available data and the truncated scatterplot. In situations where the election data and derivative statistical information is unavailable because the minority group has just recently begun to sponsor candidates or where the data is unreliable, the plaintiffs may rely on factors beyond endogenous[6] election data that prove political cohesion. *See Gingles*, 478 U.S. at 57, n. 25, 106 S.Ct. at 2770, n. 25; *Hall v. Holder*, 955 F.2d 1563, 1571 (11th Cir.1992).

The most probative exogenous elections are those that include African-American Democratic candidates against white Democratic

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[5] The experts also disagreed on the percentages necessary to demonstrate minority cohesion. A 60% vote is generally regarded as evidence of a landslide victory in American political history and is the more appropriate benchmark.

[6] Endogenous elections include voting patterns in elections for offices the plaintiffs challenge in their § 2 suit.

candidates.[7] The minority preferred candidate in the 1984 Democratic Primary for President, Jesse Jackson, received 79% of the minority vote, and in the 1988 election, 55% of the minority vote. The Jackson elections are probative of cohesion and show that the African-American Community strongly agreed upon whom the Democratic party should nominate. The 1986 State Democratic Primary for Lieutenant Governor and Governor is also probative of cohesion. The ticket that included a minority candidate received 67% of the African-American vote.

Further, there is a precedent in Worcester County that when a town government changes its electoral mechanism from an at-large to a single member district election system, African-Americans will elect an African-American candidate. In Pocomoke, with a 34% African-American population as of 1980, no African-American was elected at-large to the town council. After the creation of a single-member district, one of which has an African-American majority, a minority candidate was elected. Similar election patterns occurred in Snow Hill and Berlin.[8]

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[7] The expert testimony established that elections involving African-American Republican candidates are problematic because African-Americans generally vote for Democratic candidates. This Court also finds that the 1982 and 1986 Democratic Primaries for the Democratic Central Committee are not probative of cohesion because the lay testimony established that the African-American candidate ran for office frequently and voters did not consider him a serious candidate.

[8] In Snow Hill only one African-American was elected to the Town Commission until a three-district system was implemented in 1985. In the following election, an African-American candidate was elected from the African-American majority district. No African-American candidate had been elected to the five-member Berlin Town Council until 1980. After the town changed to a four single-member district and one at-large system with two of the districts consisting of African-American majorities, two African-Americans have been elected. The occasional success of an African-American candidates in a particular election does not necessarily disprove the existence of racial polarization. *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 937-38 (4th Cir.1987).

There was testimony that when a government changes from an at-large to a single member system, the discouragement in the African-American community which decreases cohesion is mitigated and the financial and other campaign resources flow more to the minority candidates than the white candidates. The voting patterns from the towns in Worcester County show that the elimination of an at-large electoral mechanism makes it more likely that the African-American community will vote cohesively in Worcester County.

Additionally, the County's African-American community is also politically active. It supports the local chapter of the NAACP which takes positions on issues of interest to the African-American community. *See Neal*, 689 F.Supp. at 1436. Indeed, the President of the NAACP testified that when Berlin was considering a redistricting proposal, the African-American community "worked together like a family." *See Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir.1989), *cert. denied*, 498 U.S. 937, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990) (a trial court may consider lay testimony in deciding the second *Gingles* factor); *Westwego*, 946 F.2d at 1118, n. 12 (plaintiffs may prove cohesion even without statistical evidence of racial polarization). Thus, the credible evidence establishes that African-Americans are politically cohesive in Worcester County.

2. White Bloc Voting

"The purpose of inquiring into the existence of racially polarized voting is ... to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. There are no absolute standards for gauging white bloc voting. This analysis requires a review of the extent to which white voters "bloc vote" for candidates of their choice, and assessing whether this pattern has the effect of minimizing the opportunities of minorities to participate in the system.

The experts compared election results for a twelve year period. In the two County Commissioner elections where the minority preferred candidate was an African-American, the candidates received low percentages of votes from the white community and secured higher levels of support from the African-American community. In the 1982 Democratic Primary for County Commissioner, the minority preferred candidate received 49% of the African-American vote and 0% of the white vote. The minority preferred candidate in the 1986 General Election for County Commissioner received 62% of the African-American vote and 32% of the white vote.

In the third County Commissioner election the white minority preferred candidate received 60% of the African-American ballots and 77% of the white votes. The minority candidate in this race received 40% of the African-American votes and 23% of the white votes.

When considering the limited number of endogenous elections, it is also appropriate to consider exogenous elections to prove racially polarized voting. *See, e.g., Jenkins v. Red Clay Consolidated School District Bd. of Education*, 4 F.3d 1103, 1130 (3d Cir.1993) ("an inability to offer statistical evidence on a large number of elections should not necessarily foreclose a voting rights claim"); *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 503 (5th Cir.1987), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989) ("the use of exogenous elections in cases with 'spare relevant statistical data' " is appropriate, but plaintiffs also presented endogenous evidence); *McDaniels v. Mehfoud*, 702 F.Supp. 588, 593 (E.D.Va.1988) (Racially polarized voting can be established through both anecdotal evidence and electoral analysis).

In the exogenous elections the minority preferred African-American candidates received high levels of African-American support and low levels of white support. The minority preferred candidate in the 1984 Democratic Primary for President received 79% of the African-American vote and only 5%

of the white vote. In the 1986 Democratic Primary for Lieutenant Governor and Governor, the minority preferred candidate received 67% of the African-American vote and only 13% of the white vote. The preferred African-American candidate in the 1988 Democratic Primary for President, received 55% of the minority vote and only 4% of the white vote. In the 1986 General election for Judge of the Orphans' Court the minority preferred candidate received 44% of the African-American vote and 17% of the white vote.

In the other elections examined by the experts, the minority preferred candidates were white. In the 1978 General Election for Judge of Orphans Court, the minority preferred candidates received from 48% to 65% of the African-American vote and from 41% to 48% of the white vote. The minority preferred candidate, a white Democrat, in the 1988 General Election for United States Senator, received 60% of the African-American vote and 52% of the white vote. In the 1990 General Election for United States Senator, the minority candidate of choice received 70% of the African-American vote and 73% of the white vote.

Although all elections are relevant in determining white bloc voting, the elections in which the preferred minority candidate is an African-American are more probative. *See Gretna*, 834 F.2d at 503. Section 2 specifically provides that the section is violated if "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added).

In addition to reviewing statistics, the Court must consider additional factors to determine if the white bloc vote is legally significant. Several factors can influence a court's determination of whether white bloc voting is legally significant. *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. If present, these other factors--the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts and prohibitions against single-shot voting, the number of seats open,

and the number of candidates in the field, are supportive of the minority voters' claim. *Id.* at 48, n. 15, 106 S.Ct. at 2767, n. 15.

The current residency system employed by Worcester County requires individual minority candidates for County Commission to run one-on-one, county wide against individual white candidates. This system aggravates the political disadvantage of the County's minorities. *See Ward v. Columbus County*, 782 F.Supp. 1097, 1104 (E.D.N.C.1991). Even under the best of circumstances, the at-large system debases the value of the minority's political strength.

Another factor that shows whites vote as a bloc is that in the entire history of Worcester County, with a 20% African-American population, no African-American has won a county office in a county-wide head-to-head contest against a white candidate. *See Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. at 2767 n. 15 (one of the "most important" of the Senate Report factors in demonstrating inequality of electoral opportunity is "the extent to which minority group members have been elected to public office in the jurisdiction").

3. White Crossover Voting

The election results examined by the experts were not altered by the white crossover vote which was minimal. Based on Dr. Weber's analysis, the average white crossover vote in Worcester County was 19%. In a county that has a 20% African-American voting age population and an 80% white voting age population, the African-American candidate cannot win a residential post at-large election.

Dr. Arrington analyzed the probable outcome of a race where there is an African-American candidate opposed by a white candidate and there are high levels of cross over voting and minority cohesion. The results of the analysis support the

conclusion that an African-American candidate will lose in county-wide elections.

The statistics taken together with the voting patterns and electoral system show that the white majority votes significantly as a bloc to enable it "usually to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67, and that the plaintiffs have satisfied the third requirement for proving a cause of action under the Voting Rights Act when the inhibiting electoral device is a residential post, at-large election system.

C. Totality of the Circumstances

This Court also examined the factors in the Senate Judiciary Committee Report accompanying the bill which amended § 2. Maryland and its political subdivisions bear a history of official racial discrimination against African-Americans. The Maryland Constitution of 1867 limited the right to vote to white males. Until 1864, slavery was authorized by the state constitution. Until the Fifteenth Amendment to the United States Constitution was ratified in 1870, African-Americans were denied the right to vote under the state constitution. Maryland failed to ratify this Amendment.

Legal segregation affected African-Americans in many aspects of daily life in the early 1900s. During this period, laws which made property ownership a prerequisite to voting were enacted in the County. The judicially noticed facts also show a history of official resistance to desegregation in Worcester County. It did not fully desegregate its schools after the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Accordingly, under the totality of the circumstances, the current system for election to the Worcester County Commission interacts with past and present discrimination to deprive African-Americans of Worcester County the same "opportunity

[as] other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Remedy

Once a violation of voting rights has been established the Court "should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." 1982 U.S.C.C.A.N. 208. However, in exercising its equitable powers, the Court should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation. *See McGhee*, 860 F.2d at 115. If the legislative body fails to respond, or responds with a proposed remedy that constitutes a § 2 violation, then the Court must fashion an appropriate plan. *Id.*

The legislative body should not limit its discussion of a proposed plan to single member districts which is the traditional remedy for minority vote dilution cases. Rather, it should also examine other schemes that will remedy vote dilution in Worcester County such as the modified multi-seat electoral systems, in particular, limited voting, cumulative voting and the single transferable vote. These are systems through which elections may be held in at-large districts without systematically diluting the votes of minorities. *See* Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L.Rev. 743 (1992); Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F.L.Rev. 781 (1993).

Accordingly, the Court will grant defendants 60 days to submit an acceptable remedial plan.

ORDER

In accordance with the attached Memorandum, it is this 7th day of January, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That judgment BE, and the same IS, hereby ENTERED in favor of the Plaintiffs;

2. That the Defendants SUBMIT a proposed remedial plan within 60 days of the date of this Order; and

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civ. No. Y-92-3226.

Honiss W. CANE, Jr., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

DATE: April 4, 1994.

MEMORANDUM OPINION

YOUNG, Joseph H., Senior United States District Judge.

The pending question, premised on § 2 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. § 1973, is whether the Court should adopt Bill 93-6, enacted by the defendants on May 18, 1993 or impose a court ordered plan.

I.

Plaintiffs filed an action under § 2 of the Voting Rights Act of 1965 challenging the system used by Worcester County to elect county commissioners. By Memorandum Opinion, dated January 7,

1994, the Court held that the system utilized to elect the Worcester County Commission, the governing body of Worcester County, prevented minorities from electing a candidate of their choice.[1] *See Cane v. Worcester County*, 840 F.Supp. 1081, 1090 (D.Md.1994).

This Court's decision was based on the Worcester County electoral system that was used to elect the current county commission (the "old system"). Under this system, the entire electorate of Worcester County voted on candidates for each of the five seats. Four of the seats corresponded to the County's four residency districts. Candidates were required to reside in the appropriate district. The fifth member, the commissioner-at-large, was required to reside in the County, but was not subject to district residency requirements. The five candidates who received the most votes in the general election were elected to the Board. *Cane*, 840 F.Supp. at 1084-85.

Although the Court ordered the defendants to submit a proposed remedial plan by March 8, 1994, by letter dated February 23, 1994, defendants' counsel indicated that their proposed remedial plan "was embodied in Bill 93-6, which the Court did not consider or evaluate in its January 7, 1994, Memorandum Opinion." Bill 93-6 (the "new system") was enacted on May 18, 1993, six months after the complaint in this case was filed. No elections have been held since its enactment.

Bill 93-6 eliminated the commissioner-at-large position and created a fifth commissioner residence district based on the 1990 census data.[2] In the "Legislative Findings" of the Bill, the County

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[1] Defendants' appeal of this ruling was dismissed by the United States Court of Appeals for the Fourth Circuit on March 3, 1994.

[2] Under Bill 93-6, the County Commission created the fifth residence commissioner district by dividing Commissioner Residence District No. 3, under the old system, between Berlin and Ocean Pines. The new residence commissioner district includes St. Martin and Ocean Pines and is titled Commissioner Residence District No. 5. Residence Commissioner District No. 3, under Bill 93-6, includes Berlin and the surrounding area. The other three

Commission found that a fifth population center had developed and this change in the population patterns warranted the creation of this fifth commissioner residence district.

On March 11, 1994, plaintiffs proposed two remedial plans and filed a Motion for Adoption of the Plan. Plaintiffs contend that the defendants waived their opportunity to participate in the remedial process because they failed to submit an acceptable remedial plan. Accordingly, plaintiffs ask this Court to order the defendants to adopt one of these proposed plans.[3] The defendants contend that Bill 93-6 is legally acceptable.

On March 25, 1994, the Court heard arguments on the proposals. The defendants rejected plaintiffs' two proposals as legally unacceptable and stated that, if the Court deems the plans acceptable, the defendants have no preference as to either plan, and that they would not submit any remedial plans. The plaintiffs argued that Bill 93-6 was implicitly found violative of § 2 in the Court's Memorandum Opinion and that it was not an acceptable remedial plan.

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residence commissioner districts remained the same under Bill 93-6.

[3] Plan A: A single-member district arrangement with one black majority district. Referred to as District Plan I in the Court's January 7, 1994 Memorandum Opinion. *Cane*, 840 F.Supp. at 1086. Under this Plan, the candidates for the five-member Board must be residents of the district from which they seek election, and only those voters who reside within the district are eligible to vote for candidates seeking election from that district. The candidate who receives the most votes in each district is elected to the Commission. Plan B: A cumulative voting plan. An at-large election system in which five Commissioners are elected by all registered voters within the County. Each voter may cast up to five votes in a Commission election, and may cumulate his or her votes for one or more chosen candidates. Winning candidates are the top five who receive the most votes of all Commission candidates seeking office.

II.

After a federal court has found a violation of § 2 of the Voting Rights Act and provides the appropriate legislative body the first opportunity to devise an acceptable remedial plan, "the court's ensuing review and remedial powers are largely dictated by the legislative body's response." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir.1988). If the legislative body responds with a legally unacceptable remedy or fails to respond, the court must fashion a remedy. *Id.*; *see Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir.1985). The plan is legally unacceptable if it fails to remedy the particular dilution violation, *McGhee*, 860 F.2d at 118, and fails to conform to § 2 of the Voting Rights Act. *Dillard v. Crenshaw County*, 831 F.2d 246, 249 (11th Cir.1987); *see Upham v. Seamon*, 456 U.S. 37, 43, 102 S.Ct. 1518, 1522, 71 L.Ed.2d 725 (1982). The proposed system must be measured by the historical record, the difference from the old system, and by prediction. *Dillard*, 831 F.2d at 250.

Worcester County has a population of approximately 35,028, 21.26% of whom are black and are concentrated in four areas of the county: Pocomoke, Stockton, Snow Hill and Berlin. Its current county commission was elected by an electoral system consisting of one member from each of the four residency districts and a fifth member, the commissioner-at-large, not subject to the district residency requirement. All five members are elected at-large. Under Bill 96-3 the county commission consists of one commissioner from each of the five residency districts which are elected at-large. It eliminated the commissioner-at-large.

In its January 7 Memorandum Opinion, this Court found that since the 1860's the State of Maryland and some of its political subdivisions have discriminated against blacks by resisting desegregation and employing mechanisms that prevented them from having the same opportunity to vote as other members of the electorate. *Cane*, 840 F.Supp. at 1091. The Court also found that

the black population of Worcester County is politically cohesive and a geographically insular minority group, *Id.* at 1087-89, and that even where there are high levels of cross-over voting and minority cohesion, black candidates will be defeated. *Id.* at 1090. Finally, in Worcester County no black candidate has won a county office in a county-wide head-to-head contest against a white candidate.

The evidence is clear and convincing that due to the voting patterns, the residential at-large requirements and the past and present discrimination of blacks, their voting strength is diluted. Any effective cure for this § 2 violation must therefore reach not only the commissioner-at-large, which Bill 96-3 eliminated, but it must remove the dilutive aspect of the old system. Bill 96-3 does not do this.

Bill 93-6 merely eliminated the commissioner-at-large, created a fifth commissioner district in the Ocean Pines area and retained the at-large, residential electoral system. Blacks will continue to run one-on-one, county-wide, under Bill 93-6. In essence, the blacks' opportunity to elect a candidate of their choice is no better than the old system. [4] Thus, the distinction between Bill 93-6 and the old system does not remedy the dilution violation under § 2 of the Voting Rights Act. Indeed, Bill 93-6 violates § 2.

Defendants argue that the plaintiffs must introduce competent evidence demonstrating that Bill 93-6 is unacceptable and that it is improper to compare it to the old electoral system. Such a review is impossible because there have been no elections under Bill 93-6.

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[4] Even if, under Bill 93-6, the newly created Commissioner District No. 5 and the modified Commissioner District No. 3 has a black majority voting age population, it does not increase the minority's opportunity for electing a candidate of its choice.

III.

Bill 93-6 is legally unacceptable and the defendants refuse to offer a remedial plan or express a preference for either of the plaintiffs' proposed plans. Accordingly, this Court must use its remedial authority under § 2 of the Voting Rights Act to impose a court-ordered plan. A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Once a right and a violation has been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *United States v. Paradise*, 480 U.S. 149, 183-84, 107 S.Ct. 1053, 1072-74, 94 L.Ed.2d 203 (1987) (internal quotations and citations omitted). This power is limited by the nature and extent of defendants' violations.

The plaintiffs have proposed two remedial plans: Plan A, single-member districts with a black majority district, and Plan B, cumulative voting. Since neither of the plaintiffs' proposals violate § 2, the issue is whether, based on the voting patterns in Worcester County, the blacks will have an opportunity to elect a candidate of their choice. In determining whether the plaintiffs' proposed plans offer such an opportunity, the Court will apply the coefficient called the threshold of exclusion.[5]

Under the single-member district plan one of the five districts would have a black voting age population of 62%. The threshold of exclusion is more than 50%. With a majority-vote requirement, any group that constitutes more than 50% of the electorate in that district is guaranteed that its preferred candidate will win. Thus, blacks would have a realistic opportunity to elect a candidate of their choice in the district where they have a majority.

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[5] This coefficient identifies the percentage of the electorate that any group must exceed to elect a candidate of its choice regardless of how the rest of the electorate votes. Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 750 (1992).

Under the cumulative voting arrangement, the threshold of exclusion is 16.7%. [6] Thus, any group that constitutes more than 16.7% of the voters can elect a candidate if they cumulate their votes for that candidate. If 1,000 electors vote for five positions, and if only five candidates are preferred by the majority, with an evenly split vote, a minority would need only 835 of the 5,000 votes, to elect the candidate of their choice. Because the black voting age population in the county is 19.16%, cumulative voting offers them the opportunity to elect a candidate of their choice.

However, the coefficient should not be applied in a vacuum. It is incumbent upon this Court to give great deference to legislative judgments about the nature and scope of the proposed remedy, *see McGhee*, 860 F.2d at 115; *Thornburg v. Gingles*, 478 U.S. 30, 78-79, 106 S.Ct. 2752, 2780-81, 92 L.Ed.2d 25 (1986), and to reconcile the requirements of the statute with the goals of county political policy. *See Connor v. Finch*, 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977).

In the "Legislative Findings" of Bill 93-6, the Worcester County Commission expressed a preference for an at-large electoral system because of the long history and tradition, and the importance and value of allowing all the citizens to vote for all the candidates for County Commission. (Bill 93-6, Para. 1, 3). The County Commissioners who testified during the trial wanted to avoid creating a single-member district with a black majority because it would cause County Commissioners to identify with the interests of a particular geographic area.

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[6] The threshold of exclusion in a cumulative voting arrangement is dependent on the number of seats to be filled in a given election. It may be calculated through the following formula:

$$\frac{1}{1 + \#\text{ of seats}}$$

Cumulative voting would not disturb the existing structure of government in Worcester County. Each candidate must run in the district as a whole and there is little political advantage in becoming identified with the interest of a particular locality. Thus, cumulative voting is a less drastic remedy than the single-member district plan.

The County Commission also found that dividing a municipality into two districts or combining two municipalities into the same district would be disadvantageous to common interests. (Bill 93-6, Para. 9). Instead, the County Commission expressed a preference for retaining the traditional residential election districts.

Cumulative voting, unlike single-member districts, will allow the voters, by the way they exercise their votes, to "district" themselves based on what they think rather than where they live. Thus, cumulative voting is less intrusive than single-member districts and would not require the county to divide or combine its municipalities for district purposes.

Finally, the County Commissioners wanted the successful candidates to reflect the collective interests of a greater number of citizens resulting from a county-wide election. This, the Commission contended, minimizes the likelihood of electing candidates who may not be interested in addressing all the diverse and varied issues before it. (Bill 93-6, Para. 9).

Cumulative voting is less likely to increase polarization between different interests since no group receives special treatment at the expense of others as would occur in a single-member district with one black majority district. It permits the blacks in Worcester County to achieve representation when their overall size and identity of interests are sufficient to elect a candidate. Unlike the single-member district plan, the cumulative voting plan is consistent with the county political policy goals and, also provides blacks with an opportunity to elect a candidate of their choice.

IV.

Under different facts, the Fourth Circuit has suggested that single-member districts are the only appropriate remedy in § 2 cases under a court-ordered plan. *McGhee v. Granville County*, 860 F.2d 110 (4th Cir.1988). In *McGhee*, the parties had stipulated that the Granville County at-large method of electing members to its County Commission violated § 2 of the Voting Rights Act. After the parties failed to agree to a remedy, the district court rejected the County's proposed single-member district plan and instead ordered a modified version of the plaintiff's responsive proposal for a plan based upon "limited voting"[7] in at-large elections. When the plaintiffs challenged at-large elections that prevented black candidates from being elected, the court found the preferred remedy was to create single-member districts in which black candidates were likely to be elected. *McGhee*, 860 F.2d at 118-20; *see League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir.1993) (cumulative voting mechanisms preserve at-large elections, but are not remedies for the particular structural problem that the plaintiffs have chosen to attack).

Here, the defendants did not concede liability based on the complaint as did the defendants in *McGhee*. Instead, this Court had the opportunity to assess the presentation of the evidence and demeanor of the witnesses, and judge their credibility, allowing the Court to reach a conclusion as to the aspect of the electoral system that violated § 2.

Further, the *McGhee* decision was based on the proposition that single-member districts are the only appropriate remedy when an at-large election system violates § 2. However, the factual

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[7] Limited voting, like cumulative voting, is a modified multi-seat election system. Under limited voting, the number of seats to be filled in an election exceeds the number of candidates for whom each voter may vote. Limited voting thus promotes minority representation in many cases by preventing the majority from filling all the seats.

findings lead this Court to conclude that under the totality of the circumstances, the current system for election to the Worcester County Commission interacted with past and present discrimination to deprive blacks an opportunity to elect candidates of their choice. *Cane*, 840 F.Supp. at 1091. This Court did not find that one particular aspect of the electoral system violated § 2. Thus, unlike *McGhee*, the court-imposed remedy will eliminate the discriminatory part of the county electoral system, the voting rule itself, and retain the part that is permissible, the underlying multimember district and the form of the elected body. *See Upham*, 456 U.S. at 43, 102 S.Ct. at 1522 (the court-imposed remedy is limited to those modifications of the current plan that are necessary to cure any statutory defect).

Finally, because the defendants have not proposed a legally adequate remedial plan and did not submit any other proposals or express a preference for the plaintiffs' proposals, this Court's remedial powers, unlike the court in *McGhee*, are not limited to the legislative body's response. *See McGhee*, 860 F.2d at 115. Therefore, the county will be ordered to impose a cumulative voting system to elect its county commission.[8]

ORDER

In accordance with the attached Memorandum, it is this 4th day of April, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion for Adoption of Plaintiffs' Proposed Remedial Plan BE, and the same IS, hereby GRANTED;

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[8] Cumulative voting satisfies the basic "one person, one vote" rule in that every individual voter is allocated an equal number of votes.

2. That the defendants amend the election system for the primary and general elections for Worcester County Commission in accordance with the attached Memorandum and begin implementation of a cumulative voting system within sixty (60) days.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1579

Honiss W. CANE, JR.,

Plaintiff-Appellee,

v.

WORCESTER COUNTY, MARYLAND; George M. Hurley; John E. Bloxom; Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellants,

and

George H. Dryden; Hinson Finney; Mark Frostrom,

Defendants.

Washington Legal Foundation; Center for Voting and Democracy; United States of America,

Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Joseph H. Young, Senior District Judge
(CA-92-3226-Y)

Argued July 21, 1994.
Decided Sept. 16, 1994.

Before WILKINS and WILLIAMS, Circuit Judges, and ANDERSON, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge WILKINS wrote the opinion, in which Judge WILLIAMS and Judge GEORGE ROSS ANDERSON joined.

OPINION

WILKINS, Circuit Judge:

Honiss W. Cane, Jr. and others[1] brought this action on behalf of all African-American residents of Worcester County, Maryland (collectively "Plaintiffs"), claiming that the at-large system used to elect members of the County Board of Commissioners ("the Board") diluted the voting strength of African-Americans in violation of § 2 of the Voting Rights Act of 1965, as amended June 29, 1982.[2] *See* 42 U.S.C.A. § 1973 (West Supp.1994) (Voting Rights Act). The district court found that the at-large electoral system violated § 2 and ordered the County to implement a cumulative voting system within 60 days. The County appeals, arguing that the district court erred in finding that the electoral scheme violated § 2 and in adopting a cumulative voting plan as a

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[1] The other named Plaintiffs include Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, William Waters, Gabriel L. Purnell, the Worcester County Voting Rights Coalition, and the Worcester County Branch of the NAACP.

[2] In addition to the County, Plaintiffs brought this action against the members of the Worcester County Board of Commissioners, George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as well as George H. Dryden, Hinson Finney, and Mark Frostrom--members of the Board of Supervisors of Elections for Worcester County.

remedy. We conclude that the findings of the district court regarding the § 2 violation are not clearly erroneous, but that the court abused its discretion by ordering the County to implement the cumulative voting scheme proposed by Plaintiffs. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

I.

Worcester County is a predominantly rural county on the southeastern shore of Maryland bordering Delaware and Virginia. According to the 1990 Census, the County's total population is 35,028, of which 7,448 (or 21.26%) are African-American. The voting age population of the County is 27,331, of which 5,237 (or 19.16%) are African-American. The County's African-American population is concentrated in the communities of Pocomoke, Stockton, Snow Hill, and Berlin.

The Board is composed of five commissioners and serves as the legislative and executive body of the County. When this action was filed in November 1992, County law provided that the commissioners of the Board be elected at large under a residency district system. The County was divided into four residency districts, and four commissioners were required to reside in the residency district corresponding to the Board seat for which they were elected. The fifth member was a commissioner-at-large, who was required to be a resident of the County but was not required to reside in any particular district.

In May 1993, after this action was filed but before the first hearing was held, the Board passed Bill 93-6, which amended the voting scheme for electing commissioners to the Board. The revised plan maintained the at-large electoral scheme, but divided the County into five residency districts, eliminating the commissioner-at-large position and establishing a fifth designated post. The legislative findings accompanying Bill 93-6 indicate that the Board determined that a fifth population center had developed

and that this change in population patterns warranted the creation of the fifth residency district.

After conducting a bench trial on the merits, the district court issued a memorandum opinion dated January 7, 1994, containing its findings of fact and conclusions of law. *Cane v. Worcester County, Md.*, 840 F.Supp. 1081 (D.Md.1994). The district court concluded that the County's former electoral scheme violated § 2 of the Voting Rights Act and ordered the County to submit a remedial plan within 60 days. *Id.* at 1091. The County advised the district court that it believed that its then current plan, embodied in Bill 93-6, met all constitutional and statutory voting rights requirements.

Plaintiffs submitted two proposed remedial plans and moved for the district court to adopt one of them. The first plan proposed by Plaintiffs, Plan A, provided for a single-member district system composed of five districts with one of the five districts being a majority African-American district. Voters would cast one vote for a candidate running in the district in which they reside. The candidate receiving the most votes in each of the five districts would be declared the winner.[3] The second plan, Plan B, proposed a cumulative voting system pursuant to which all candidates would run in a countywide at-large election. Each voter would be allowed to cast five votes and to allocate all of them to one candidate or divide them among several candidates. The five candidates receiving the most votes among all of those offering for election would win a seat on the Board.[4]

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[3] The district court summarized Plan A as follows: A single-member district arrangement with one black majority district.... Under this Plan, the candidates for the five-member Board must be residents of the district from which they seek election, and only those voters who reside within the district are eligible to vote for candidates seeking election from that district. The candidate who receives the most votes in each district is elected to the Commission. *Cane v. Worcester County, Md.*, 847 F.Supp. 369, 371 n. 3 (D.Md.1994).

[4] The text of Plan B provides: A cumulative voting plan--an at-large election system in which five Commissioners are elected by all registered voters within the County. Each voter may cast up to five votes in Commission elections, and

The district court concluded that the County's current plan, embodied in Bill 93-6, was legally unacceptable because it failed to remedy the established § 2 violation. *Cane v. Worcester County, Md.*, 847 F.Supp. 369, 371-72 (D.Md.1994). Relying on the County's preference for an at-large electoral scheme expressed in the legislative findings of Bill 93-6, the court then ordered the County to implement Plan B, the cumulative voting scheme proposed by Plaintiffs. *Id.* at 373-74. [5]

II.

Section 2 of the Voting Rights Act prohibits any "qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C.A. § 1973(a). A denial or abridgement of the right to vote in violation of § 2 is established when:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to

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may cumulate his or her votes for one or more chosen candidates. Winning candidates are the top five vote-getters of all Commission candidates vying for office, elected by a simple plurality of votes. The cumulative voting plan applies both to primary elections and general elections for Worcester County Commission.

[5] While the opinion of the district court is not clear regarding the treatment of the residency districts, the parties agreed at oral argument that the residency districts were abolished under the cumulative voting plan imposed by the district court.

> office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973(b).

In order to prove that the use of a multimember district dilutes their votes in violation of § 2, members of a protected minority group must establish three "necessary preconditions." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766-67, 92 L.Ed.2d 25 (1986). "First, the minority group must be ... sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S.Ct. at 2766. "Second, the minority group must be ... politically cohesive." *Id.* at 51, 106 S.Ct. at 2766. And third, the majority must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.*

Once the three preconditions set forth in *Gingles* are established, the trier of fact must determine whether, based on a totality of circumstances, the use of a multimember district violates § 2. *See Johnson v. De Grandy*, — U.S. —, —, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994). The essence of this inquiry is whether the "electoral ... structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. at 2764. Factors relevant to the analysis include, but are not limited to: (1) a history in the state or political subdivision of official voting-related discrimination against the minority group; (2) the extent of racial polarization in the elections of the state or political subdivision; (3) the extent to which the state or political subdivision has used voting practices or procedures that enhanced the opportunity for discrimination against the minority group; (4) the exclusion of minority group members from the candidate slating processes; (5) the extent to which past discrimination in areas such as education,

employment, and health hinder the ability of members of the minority group to participate effectively in the political processes; (6) the use of racial appeals in political campaigns; (7) the extent to which minority group members have been elected to public office in the relevant jurisdiction; (8) whether elected officials exhibit a significant lack of responsiveness to the particularized needs of minority group members; and (9) whether the policies offered to justify the challenged voting practice are tenuous. *Id.* at 44-45, 106 S.Ct. at 2763-64 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07). While each of these factors may be probative, no single factor or combination of factors is dispositive. *Id.* at 45, 106 S.Ct. at 2763-64. The ultimate finding of a district court that based on the totality of the circumstances an election scheme dilutes minority voters' ability to participate in the political process and to elect representatives of their choice in violation of § 2 is a factual finding subject to a clearly erroneous standard of review. *Id.* at 78-79, 106 S.Ct. at 2780-81.

A.

In its analysis of the first *Gingles* precondition, the district court reviewed two alternative single-member district plans submitted by Plaintiffs. *Cane*, 840 F.Supp. at 1086. It noted that because the African-American population was spread across several different regions of the County, the construction of a majority African-American district would necessarily entail the running of commissioner district lines across election districts and through at least two municipalities. *See id.* at 1086-87. However, the court determined that it was possible to construct a majority African-American district that was "not unreasonably irregular in shape" because the African-American population was concentrated in several small pockets. *Id.* at 1086. Noting that the first plan submitted by Plaintiffs did "not rely on districts that run through several 'tentacle-like corridors' nor [we]re the district[s'] boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering," the district court specifically found that

although the resulting districts were not symmetrical, they were compact. *Id.* at 1087. In sum, the district court found that the African-American voters of Worcester County were a sufficiently large and geographically compact group to create a majority African-American district under a single-member district voting scheme.

With respect to the second *Gingles* precondition, the district court first noted that the two statistical methods used by the parties' experts to evaluate voting behavior in Worcester County failed to produce reliable statistical evidence because of the lack of available data and a truncated analysis caused by the small number of districts and lack of a majority African-American district. *Id.* at 1087-88. The court then proceeded to review the results of both endogenous and exogenous elections, concluding that African-Americans exhibited a significant degree of political cohesion when consideration was given to the race, political party, and experience of individual candidates. *See id.* at 1087-89. Further, the evidence showed that in towns in Worcester County that had converted from an at-large to a single-member district electoral system, an African-American was elected to the town councils from the newly created majority African-American districts. *Id.* at 1088. Finally, the court noted that the African-American population in the County is politically active, providing substantial support to the local chapter of the NAACP and causes of interest to the African-American community. *Id.* at 1089. Based on this evidence, the district court found that African-Americans in Worcester County are politically cohesive. *Id.*

In its analysis of the third and final *Gingles* precondition, the district court first reviewed the results of the two County commissioner elections in which the minority-preferred candidate was an African-American. *Id.* In each of these elections, the minority-preferred candidate received only a small percentage of the white vote. *Id.* A review of exogenous elections demonstrated similar voting patterns: The minority-preferred candidates in both

national and local elections generally received a small percentage of the vote from white voters in Worcester County. *Id.* at 1089-90.

The court concluded that this evidence of white bloc voting was legally significant due to the structure of the scheme for electing commissioners to the Board. *Id.* at 1090. Under the at-large residency district system, minority candidates were required to run one-on-one, countywide against individual white candidates. Even taking into consideration the white crossover vote, which averaged 19 percent, the court found that the at-large electoral system debased the value of African-American political strength because the combined African-American and white-crossover vote would be unable to elect an African-American candidate. This conclusion was supported by evidence that in the history of Worcester County an African-American candidate has never won a countywide, head-to-head contest against a white candidate. *Id.*

Once it found that the three *Gingles* preconditions were satisfied, the district court reviewed other factors in determining whether, under a totality of circumstances, the system of electing commissioners to the Board violated § 2. *Id.* at 1090-91. The court specifically noted that African-Americans were denied the right to vote in Maryland until 1870 and that in the early 1900s the State employed voting prerequisites that enhanced the opportunity for discrimination against African-Americans. *Id.* at 1091. Taking into consideration these factors and those discussed above, the court concluded that "under the totality of the circumstances, the current system for election to the Worcester County Commission interacts with past and present discrimination to deprive African-Americans of Worcester County the same 'opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Id.* (alteration in original) (quoting 42 U.S.C.A. § 1973(b)).

B.

Having carefully reviewed the record, we are unable to conclude that the district court was clearly erroneous in finding that the use of an at-large residency district system for electing commissioners to the Board impermissibly diluted the votes of African-Americans.[6] Accordingly, we affirm its conclusion that the former electoral scheme violated § 2 of the Voting Rights Act.

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[6] With respect to the finding of a § 2 violation by the district court, the County principally contends that Plaintiffs have failed to satisfy the first *Gingles* precondition of geographical compactness because the creation of a single-member majority African-American district would require district lines to be drawn solely on the basis of race--a practice condemned by the Supreme Court in *Shaw v. Reno*, — U.S. —, —, 113 S.Ct. 2816, 2827, 125 L.Ed.2d 511 (1993), as "altogether antithetical to our system of representative democracy." However, the Court in Shaw upheld the intentional use of race in the redistricting process, recognizing that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Id.* at 2826. The Court concluded that race consciousness in the redistricting process constitutes impermissible race discrimination only when "traditional districting principles" are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation. *Id.* — U.S. at — - —, 113 S.Ct. at 2827-30. The County asserts that the creation of a majority African-American district would ignore traditional districting principles because it would require the division of at least two municipalities. However, simply because district lines may be drawn "to maintain the integrity of political subdivisions," *id.* — U.S. at —, 113 S.Ct. at 2826, does not mean that a proposed majority-minority district that would divide municipalities fails to comply with traditional districting principles, *see Clark v. Calhoun County, Miss.*, 21 F.3d 92, 96 (5th Cir.1994) (concluding that plaintiffs had not necessarily failed to prove the first Gingles precondition of geographical compactness solely because the creation of a majority-minority district would require the division of three separate municipalities). The undisputed evidence indicated that the single-member district plans proposed by Plaintiffs adhered to other traditional districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways. In addition, the uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. *See Shaw*, — U.S. at —, 113 S.Ct. at 2827. Drawing districts based on such common interests is perhaps one of the most often invoked districting principles. *See, e.g., Gaffney v. Cummings*, 412

III.

Once a violation of § 2 of the Voting Rights Act has been established, a district court should give the appropriate legislative body the first opportunity to devise a remedial plan. *McGhee v. Granville County, N.C.*, 860 F.2d 110, 115 (4th Cir.1988). The ensuing review by and the remedial powers of the district court are largely dictated by the action taken by the legislative body. *Id.* When the legislative body responds with a proposed remedy, the "court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable." *Id.* If the proposed remedial plan is legally acceptable, then the district court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions." *Id.* "If the legislative body fails to respond or responds with a legally unacceptable remedy, the responsibility falls on the District Court to exercise its discretion in fashioning a near optimal plan." *Id.* (citations and internal quotation marks omitted).

A.

The County asserts that the district court erred in concluding that Bill 93-6 was a legally unacceptable plan. A proposed plan is a legally unacceptable remedy if "it violates ... constitutional or statutory voting rights--that is, [if] it fails to meet the same standards applicable to an original challenge of" an electoral

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U.S. 735, 752-53, 93 S.Ct. 2321, 2331-32, 37 L.Ed.2d 298 (1973). Finally, the shape of the proposed majority African-American district is not geographically bizarre. Rather, it is similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme. Thus, we find meritless the County's assertion that the geographical compactness finding of the district court violates the dictates of *Shaw*.

scheme. *Id.* Bill 93-6 altered the former electoral scheme by eliminating the commissioner-at-large position and creating a fifth residency district. Each of the five commissioners of the Board were still elected at-large. This amendment of the County's electoral scheme did not remedy the system's dilution-by-submergence effect because it retained at-large voting--the structural cause of the vote dilution. As conceded by the County at oral argument, minority-preferred candidates are no more likely to win a seat on the Board under the scheme established by Bill 93-6 than they were under the former electoral scheme. Bill 93-6 is not a legally acceptable remedy and the district court properly rejected it.

B.

With respect to the remedy imposed by the district court, the County principally argues that cumulative voting is a radical departure from traditional elections systems, and thus, it may not be judicially imposed to remedy a § 2 violation. Justice Thomas recently suggested that "nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2." *Holder v. Hall*, — U.S. —, —, 114 S.Ct. 2581, 2601, 129 L.Ed.2d 687 (1994) (Thomas, J., dissenting). We are not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision. Our review is limited by the specific facts and circumstances presented here, and under them, the district court abused its discretion in adopting the cumulative voting scheme proposed by Plaintiffs.

As noted above, we stated in *McGhee* that if the remedial plan proposed by the appropriate legislative body is legally acceptable, the district court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy." 860 F.2d at 115. Because the plan proposed by the County in *McGhee* was legally acceptable, we did not reach the

issue of the degree of deference the court must accord legislative judgments in exercising its discretion to fashion a remedy when the legislative body fails to propose a remedy or its proposed remedy is legally unacceptable. We are confronted with that issue here and conclude that even when the legislative body fails to offer a remedy or its proposed remedy is legally unacceptable, the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body. *See White v. Weiser*, 412 U.S. 783, 793-96, 93 S.Ct. 2348, 2353-55, 37 L.Ed.2d 335 (1973) (holding that the district court, after properly rejecting the reapportionment plan adopted by the legislature, erred in ignoring legislative districting policy and failing to implement a reapportionment plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"); *see also Whitcomb v. Chavis*, 403 U.S. 124, 160-61, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971) (holding that the district court erred in fashioning a plan that rejected state policy choices more than was necessary to remedy the specific constitutional violations involved).

In reviewing the two plans submitted by Plaintiffs, the district court recognized its obligation "to give great deference to legislative judgments about the nature and scope of the proposed remedy and to reconcile the requirements of the statute with the goals of county political policy." *Cane*, 847 F.Supp. at 372-73 (citations omitted). The court provided two justifications for its selection of Plan B, the cumulative voting plan. First, it concluded that permitting all of the citizens to vote for all of the candidates would promote the County's desire to have commissioners serve the collective interest of the County by requiring the candidates to appeal to all of the voters in the County. *Id.* at 373. Second, it noted that Plan B would avoid the creation of districts that split or combined municipalities. *Id.*

However, the district court failed to give due deference to another legislative judgment set forth in the record. The County clearly expressed a preference for residency requirements that would ensure that the Board members were knowledgeable of and responsive to the diverse interests of the various regions of the County. The legislative findings accompanying Bill 93-6 provided that "[t]he Maryland General Assembly has recognized the desirability of, and Worcester County has for almost two centuries been well served by, having the governing body of the County representative of the distinct southern, central, and northern areas of the County." Since 1798, the County government has been structured to allow the members of the County's governing body to "be disbursed as equally as may be throughout the County." In amending the district system to add a fifth residency district, the Board explained that:

> The best interests of the citizens in each of the different areas of the County can be best served by ... retaining the existing four commissioner residence districts with the creation of a new fifth commissioner residence district from a portion of the existing Commissioner District No. 3 so that there shall be one Commissioner from each of the population centers, or surrounding area, who shall be familiar with and knowledgeable of the people, conditions, needs and concerns of that particular section of the County.

In adopting the cumulative voting plan set forth in Plan B, the district court failed to defer to this expressed legislative preference. It abolished the residency districts, imposing a plan that would permit all five seats on the Board to be filled by individuals living in the same general area of the County. In sum, it failed to adequately defer to the "variety of political judgments about the dynamics of [the] overall electoral process that rightly pertain to the legislative prerogative of" the County. *McGhee*, 860 F.2d at 115.

IV.

When a political subdivision fails to submit a legally acceptable proposed remedy, the appropriate course for the district court to follow is to fashion a remedy that complies with § 2 and effectuates to the greatest extent possible the policy judgments expressed by the County. However, here the district court failed to rule on the legality of the scheme set forth in Bill 93-6--the electoral system in effect at the time the matter was pending before the court. Therefore, the County was not advised that its current electoral system, Bill 93-6, violated § 2 when it was directed to submit a proposed remedy.[7] For this reason, we conclude that the proper course of action is to remand to the district court with instructions to afford the County an opportunity to submit a proposed plan of its choosing that remedies the § 2 violation.[8]

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED.

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[7] As we noted above, Bill 93-6 and the County's former electoral system are structurally identical for purposes of a § 2 analysis. Therefore, we need not remand the case to allow the district court to find in the first instance that Bill 93-6 violates § 2.

[8] At oral argument, the County expressed a strong preference for a single-member district plan, assuming the finding of a violation was upheld. It indicated that it had previously failed to express a preference between the two plans submitted by Plaintiffs because it interpreted our decision in *Neal v. Harris*, 837 F.2d 632 (4th Cir.1987), as holding that any such concession would constitute a binding admission on the issue of liability. Because the County will be faced with the prospect of submitting a remedial plan on remand, we note that *Harris* does not stand for the proposition assigned it by the County. *Harris* simply held that once a government enters a consent decree, expressly agreeing that the plaintiffs should be granted appropriate relief, it may not thereafter seek to avoid the immediate imposition of such relief by arguing that its current electoral system does not violate § 2 of the Voting Rights Act. *Id.* at 634.

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, Jr., *et al.*

Respondents.

No. 94-995.

Feb. 21, 1995.

Case below, 847 F.Supp. 369; 35 F.3d 921.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit is denied.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Honiss W. CANE, Jr., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

Civ. No. Y-92-3226.

DATE: Jan. 6, 1995.

OPINION

YOUNG, Joseph H., Senior United States District Judge.

In *Cane v. Worcester County*, 35 F.3d 921 (4th Cir.1994), the Fourth Circuit affirmed the Court's finding that the at-large electoral system used by Worcester County ("County") for election of the County Board of Commissioners ("Board") was violative of § 2 of the Voting Rights Act, 42 U.S.C. § 1973,[1] and reversed and remanded the Court's imposition of a remedial system based upon cumulative voting with instructions to afford the County an opportunity to submit a plan to remedy the § 2 violation. In accordance with the remand, the County proffered three alternative

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[1] *Cane v. Worcester County*, 840 F.Supp. 1081 (D.Md.1994). The Fourth Circuit also affirmed the Court's finding that Bill 93-6, an effort to modify the invalidated electoral system, was structurally identical to that scheme and thus violative of § 2. *Cane v. Worcester County*, 35 F.3d at 929 n. 7.

proposals and the plaintiffs submitted one plan, and a hearing was held on the merits.

The County, afforded the first opportunity to devise an electoral plan to remedy the § 2 violation, now claims it was not afforded a meaningful opportunity to respond because of the allegedly strict deadlines imposed by the Court. The County, however, did not begin consideration of potential alternatives until after the denial by the Fourth Circuit of the County's petition for a rehearing en banc. This was six weeks after the panel's opinion and almost two years after the legality of the County's voting scheme was first challenged in court.[2] Moreover, the testimony of County officials suggests that they believe that the plans presented were the best that could be developed and that additional time would not allow for meaningful improvements in the plans.[3] The Court finds the County has been afforded an adequate opportunity to remedy the § 2 violation. Accordingly, the three plans submitted will be considered by the Court.[4]

A plan proffered by a legislative body to remedy a § 2 violation must provide the protected minority group with a "realistic opportunity to elect a representative of their choice."

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[2] The County also claims that the Court should allow more time before issuing an opinion because the County was not given adequate time to hold public hearings to help devise a remedial plan. No hearings were held, however, to consider the County's position in the original suit or the appeal and no hearings were scheduled following the Court's ruling or the Fourth Circuit's opinion. Further, Board President Jeanne Lynch testified that, "[p]ublic hearing may have a very chilling effect," suggesting that she felt that public hearings on this issue were unlikely to aid the development of a remedial plan.

[3] Commissioner Sonny Bloxom testified that, even with more time, "I don't think you're going to find another way of drawing the districts [other than those proposed] ... no way."

[4] The County has also asked the Court to delay imposition of a new voting system until the United States Supreme Court has considered the County's appeal of the finding of a § 2 violation. The citizens of Worcester County have had their right to vote put on hold long enough and the Court will not tolerate further delay.

Ketchum v. Byrne, 740 F.2d 1398, 1413 (7th Cir.1984). At a minimum, a remedial plan must not itself be violative of the Voting Rights Act. *See, Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 1521-22, 71 L.Ed.2d 725 (1982). Therefore, a threshold question when evaluating such a plan is whether it violates the standards announced in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).[5]

First, it should be noted that it has been established that the African-American community in Worcester County is politically cohesive and sufficiently large and compact to constitute a majority in a single-member district.[6] Further, the Fourth Circuit accepted the Court's findings that the white community has typically voted as a bloc to defeat the minority's preferred candidate, and that, considering the totality of the circumstances, African-Americans have not had the same opportunity as whites to participate in the electoral process and to elect representatives of their choice.

The remaining issue, therefore, is whether any of the proposed remedial plans preclude the majority from voting as a bloc to defeat the minority's preferred candidate. The County insists that its three plans are due great deference, but the Court can be deferential only

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[5] A voting scheme violates § 2 if: 1) A minority group is sufficiently large and compact to be able to constitute a majority in a single-member district, 2) The minority group is politically cohesive, 3) The majority votes sufficiently as a bloc typically to defeat the minority's preferred candidate, and 4) Based on the totality of the circumstances, there is an inequality in the opportunities of minority voters to elect their preferred candidates. *Thornburg v. Gingles*, 478 U.S. at 47-51, 106 S.Ct. at 2764- 67; *Growe v. Emison*, — U.S. —, —, 113 S.Ct. 1075, 1084-85, 122 L.Ed.2d 388, 404 (1993) (applying *Gingles* to single-member district voting schemes).

[6] The Court found sufficient size and compactness, and thus the existence of a potential remedy for the § 2 violation, based upon the plaintiffs' proposed single-member district plan. *Cane v. Worcester County*, 840 F.Supp. at 1086-87. The Circuit Court affirmed, finding "... meritless the County's assertion that the geographical compactness finding of the district court violates the dictates of *Shaw [v. Reno*, — U.S. —, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)]." *Cane v. Worcester County*, 35 F.3d at 927 n. 6.

if it finds that one of the plans remedies the § 2 violation.[7] The County's plans cannot be accepted if they continue to allow white candidates to control all of the seats on the Board.

PROPOSED REMEDIAL PLANS

The County's Plan # 2 has been the primary focus of the attention of the parties, and it will be considered first. This scheme divides the County into five single-member districts for both the primary and general elections.[8] The County has attempted to remedy the § 2 violation with the creation of District 3 in which African-American voters comprise 44.68% of the voting age population. The County asserts that in this district, "... black voters in Worcester County [would] enjoy a functional majority[9] ... and an equal opportunity to elect the representative of their choice."

The County bases this assertion largely on the work of Dr. Allan Lichtman and Gerald Hebert in "A General Theory of Vote

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[7] The County cites *NAACP v. Kershaw County, S.C.*, 838 F.Supp. 237, 241 (D.S.C.1993): "Once the legislative body has offered a remedy by which the protected voting group has a voting opportunity that relates favorably to the group's population ... the Court must ... accord great deference to such a legislative choice." Reliance upon *Kershaw* in this context is misplaced, however, for if the Court finds that the minority group's opportunity is inadequate, no deference to the plan is due.

[8] Plan # 2 (Percentages of voting age population by district): Dist. 1: White–69.97% Black–29.21%: Containing Pocomoke City and rural areas in the southern region of the County. Dist. 2: White–77.39% Black–22.13%: Containing Snow Hill and rural areas in the western region of the County. Dist. 3: White–54.71% Black–44.68%: Containing Berlin, Newark, and Stockton and rural areas in the center of the County. Dist. 4: White–96.92% Black–2.22%: Containing rural and resort areas along the west coast of the Chincoteague Bay. Dist. 5: White–95.75% Black–3.42%: Containing Ocean City and rural and resort areas along the Atlantic Ocean.

[9] A functional majority district in this context would be one in which blacks, although a minority of voters, could nonetheless typically elect the candidate of choice as a result of white cross-over votes.

Dilution," 6 La Raza L.J. 1 (1993). The authors do argue that, in principle, "[a] remedial district may include a white population majority if coalition voting is sufficient to elect minority-preferred candidates." *Id.* at 17. It should also be noted that the authors state that the party asserting the adequacy of a remedial district based upon a functional majority should, "have the burden of showing that minority cohesion and turnout, as well as white "crossover" voting are sufficiently high to enable minorities to elect candidates of their choice." *Id.*

The creation of a functional majority district would, in theory, negate the third prong of the *Gingles* test. If a minority community is sufficiently large and a white community is sufficiently fractious, then the majority will be unable to vote as a bloc to enable it usually to defeat the minority's preferred candidate.

The Supreme Court has held that a finding of vote dilution in a multi-member districting plan generally requires remediation by the creation of super-majority districts. *Growe v. Emison*, — U.S. at —, 113 S.Ct. at 1083-84, 122 L.Ed.2d at 403. Remedial districts have been required to contain more than a "... mere majority even of [minority] voting age population ..." unless there is specific evidence on the record to overcome the accepted presumption that a super-majority is necessary for electoral success. *Ketchum v. Byrne*, 740 F.2d at 1413. Further, courts have been reluctant to even consider cross-over voting when adjudicating § 2 remedies. *See, Smith v. Brunswick County, VA Bd. of Supervisors*, 984 F.2d 1393, 1400-01 (4th Cir.1993). Indeed, a remedial plan has never been accepted when its success was dependent entirely upon the effectiveness of functional majorities.

The County nonetheless insists that the 44.68% "functional majority" in District 3 remedies the § 2 violation because the cross-over of white voters will give an equal chance of electoral success to African-Americans. This position is unsupported by the record, however, and the data in fact suggests that District 3 will be dominated by whites. Thus the County has failed to sustain the

burden, as described by Lichtman and Hebert and suggested in Ketchum, placed on the proponent of a functional majority district. Assuming that all eligible voters do vote,[10] white voters will still control the electoral outcome in District 3 whether predictions of future voting behavior and electoral outcomes are based upon the average cross-over rates or individual elections. The average white cross-over rate in Worcester County is 19%, while the data for African-American cross-over is less certain. The Court found minority cohesion to be at least 60%, but for the purposes of this analysis it will be assumed to be 80%.[11] Applying those percentages to future elections in the proposed District 3, the candidate preferred by white voters would win with 54% of the vote.[12]

If, alternatively, the Court uses the 1986 District 3 election to predict future voting behavior as urged by the County, the projected rate of African-American cross-over voting would be 38.2% and 32.2% for white cross-over voting.[13] Again, if such numbers are applied to the County's proposed District 3, the white candidate would win with 54% of the vote.[14]

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[10] In Worcester County, 77% of white voters register to vote while only 32% percent of eligible African-American voters register. (A large and relatively equal percentage of registered African-American and white voters actually vote). Such patterns are, of course, precisely the reason that a super-majority is typically required in remedial districts, and Dr. Ronald Weber, the County's expert, concedes Lichtman and Hebert's assertion that participation levels are crucial to an evaluation of the effectiveness of a functional majority district.

[11] This figure, which Dr. Weber describes as indicating "strong levels" of voter cohesion, is substantially higher than that asserted by the County during the original proceedings.

[12] White Candidate: 2,547 votes African-American Candidate: 2207 votes.

[13] There is no recorded instance of a larger percentage of white cross-over votes for an African-American candidate running against a white candidate, while African-American cross-over voting for white candidates has been frequently higher.

[14] White Candidate: 2,590 votes African-American Candidate: 2,164 votes.

The County has been unable to prove, either from projecting average cross-over voting or voting in specific elections, that the African-American preferred candidate would win, or would have an equal chance to win, an election in District 3. Plan # 2 allows the majority to vote as a bloc to defeat the minority's preferred candidate even if the Court assumes that African-Americans will participate at the same rate in the political process as whites. Furthermore, if actual registration levels are taken into account, the African-American preferred candidate would not win even if white cross-over was at its historic high, 32%, and African-American cohesion was 100%. Plan # 2 is thus unacceptable as a remedial plan.

Plan # 1 uses the same district lines as Plan # 2 as part of a residency district/at-large system which is essentially the same as that considered by the Court in the original proceedings.[15] In such a system, candidates would stand for election in the residency district in which they live. County voters, alternatively, would participate in all five primary elections and five one-on-one general elections based on those districts regardless of where they live.

The County asserts that, because of "contest effects," many voters are likely to vote only in the elections involving candidates representing their residency district. Thus, the County argues, the dilutive effect of an at-large electoral system is reduced and a remedy is provided for the § 2 violation by concentrating African-Americans in District 3. While the evidence does not support the claim that dilution is minimized,[16] even if the County's argument is accepted to its extreme, the plan is invalid. If voters of a given residency district only voted in the races involving

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[15] Indeed, the County has expressed a strong preference for Plan # 1 as it comes closest to the system imposed by Bill 93-6. The only differences are the shapes, and therefore the racial composition, of the residency districts.

[16] The County enigmatically argues that this plan simultaneously emphasizes "voter empowerment" by allowing citizens a voice in every Board election while urging the Court not to lightly dismiss the assertion that voters will only vote in the campaign involving their residency district.

candidates from that district, Plan # 1 would, in effect, be reduced to Plan # 2 and would be unacceptable for the same reasons. Alternatively, to the extent voters participated in multiple election, this plan unlawfully limits African-American political power through dilution-by-submergence.[17] Plan # 1 is a legally inadequate remedy.[18]

Plan # 3 creates a single-member district system based upon the electoral boundaries established in Bill 93-6. African-Americans would make up the largest percentage of voting age population in District 2 of Plan # 3, but would comprise only 33.6% of the voting age population. The County makes the same functional majority claims for this plan that it does for Plan # 2, and thus the analysis invalidating Plan # 2 invalidates Plan # 3.

ALTERNATIVE REMEDIES

If a municipality fails to proffer an acceptable remedy following a finding of a § 2 violation, a court must exercise its discretion to fashion a "near optimal" plan. *See, Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). When doing so, the court's remedy, "must include consideration of both racial fairness and traditional districting principles." *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2nd Cir.1994). Thus, while the Court need not defer to the County's specific proposals if they are violative of § 2, it must nonetheless effectuate "to the greatest

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[17] There is no need to reiterate the reasons that this type of voting scheme is unlawful in Worcester County. Regardless of the composition of the residency districts, for the purposes of a *Gingles* analysis Plan # 1, Bill 93-6, and the County's original electoral system are structurally identical.

[18] The County argues that Plan # 1, and indeed all three plans, enhance the opportunities of African-Americans to elect the candidate of their choice. Enhancement, while relevant to a § 5 claim, is irrelevant to a § 2 claim. The issue is not whether a proposed electoral system is superior to the invalidated one, but rather whether the proposed system is an adequate remedy for a Voting Rights Act violation.

extent possible the policy judgments expressed by the County" which underlie those proposals. *Cane v. Worcester County*, 35 F.3d at 929.

The County has voiced a number of such judgments throughout the course of these proceedings. It stated that its primary desire is to ensure that its electoral system balances the potentially competing considerations of respect for political subdivisions,[19] the maintenance of geographical diversity on the Board,[20] and the preservation of a county-wide community of interests.[21] The County has also asserted a desire to empower the African-American community while avoiding racial polarization and respecting non-racial communities of interest.

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[19] Bloxom asserted that, "the ideal, of course, [is] to keep the towns intact...." Bill 93-6, which Bloxom said "expresses the legislative findings and the wishes of the government of Worcester County ...," notes that, "Worcester County has a long history and strong tradition of election districts based upon population centers and defined geographic areas of the county ... [which also] serve as a focus for the community, enhance social interaction within the district, promote areas of common interests, and foster friendly competition between districts and communities."

[20] "[The municipalities] are independent of each other and often in competition with each other for county services and facilities, government grants and economic development...." Bill 93-6. The County has expressed the fear that, if towns are divided or geographic diversity on the Board not maintained, the Board will be unable to adequately and fairly reconcile the competing municipal interests in the County.

[21] The County has repeatedly emphasized its preference for some form of at-large elections so that all of the commissioners will be responsible to all of the voters. As noted in Bill 93-6, "Requiring each commissioner candidate to stand for election and to campaign throughout the county helps each candidate appreciate and understand the different parts of the county and encourages commissioners so elected to make decisions based upon the best interests of the entire county rather than to pursue actions which may be beneficial to only one geographical area but which would be detrimental to the rest of the county ... at-large elections serve to promote cooperation among the regional areas on important county-wide issues and help to minimize divisive north-county/south-county polarization."

It is in the context of these policy judgments that the Court must first consider the single-member district plan offered by the plaintiffs. The plan is superficially similar to the County's Plan # 2, but the remedial district in the plaintiffs' plan contains a 62% African-American voting age majority. The district divides the towns of Snow Hill and Berlin, placing the largely African-American sections of those municipalities in the plan's remedial district, and extending southward to include a predominately African-American section of Pocomoke City.

The County strongly opposes the imposition of the plaintiffs' plan and has repeatedly argued that the division of the towns necessitated by the plaintiffs' plan will undermine the Board's ability to balance the competing interests among the various regions of the county.[22] It is also concerned that the plaintiffs' plan will result in extreme racial polarization and will politically disadvantage African-Americans in the County because, quoting *Shaw v. Reno*, — U.S. at —, 113 S.Ct. at 2827, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Ultimately, the County is concerned that the imposition of a single-member plan, and especially one as allegedly contentious as that proposed by the plaintiffs, will threaten the political community that was created and supported by an at-large electoral system.[23] In short, the County insists that the plaintiffs' plan does little to advance the County's expressed political goals.

Many of these concerns were raised during the original proceedings, and the Court was, and is, reluctant to require a community with such a history of electoral structures and priorities to use the plaintiffs' single-member district plan. It was, in part,

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[22] For example, Bloxom suggested that division of the towns would, because "often their [the towns'] interests are divergent," make it very difficult for the Board to "spend the county tax dollars in the way that satisfies all the citizens of the county."

[23] Lynch asserted that a "district system polarizes, I believe, terribly."

because of the political values expressed by the County that the Court originally chose to impose a cumulative voting regime.

The Circuit Court found, quoting Justice Thomas in *Holder v. Hall*, — U.S. —, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), that there is nothing inherently radical or inappropriate about the judicial imposition of cumulative voting pursuant to a finding of a § 2 violation. *Cane v. Worcester County*, 35 F.3d at 927-28. It acknowledged that cumulative voting would "promote the County's desire to have commissioners serve the collective interest of the County by requiring the candidates to appeal to all of the voters in the County." *Id.* at 928. Further, cumulative voting would obviously not require the division of municipalities. *Id.*

In light of the Fourth Circuit's decision, and in strong deference to the County's expressed policy judgments, the Court will not impose the plaintiffs' plan but rather will exercise its discretion to attempt to fashion a "near optimal" plan for the County. The County's primary elections for Board of Commissioners will be by single-member district based upon the district maps designed by the County for Plans # 1 and # 2. The general election will be by cumulative voting as described in *Cane* v. Worcester County, 847 F.Supp. 369, 372-74 (D.Md.1994). The use of cumulative voting in the general elections will provide the benefits previously described by the Court, while a single-member district primary will ensure substantial geographic diversity on the Board.

The Court's plan will provide a substantial remedy for African-American citizens of Worcester County. The record suggests that African-Americans in the County are primarily Democrats, while whites are split relatively evenly between the parties. This being so, African-Americans will comprise a significant majority of Democrats in District 3 and should be able to elect their preferred candidate in the primaries.[24] A cumulative

[24] A conservative estimate based upon the record is that 80% of African-American voters are Democrats, 10% are Republicans, and 10% are

voting regime for the general election would then allow African-Americans voters county-wide to elect the nominated Democrat from District 3 if they so chose. *See, Cane v. Worcester County*, 847 F.Supp. at 372.[25]

The Court's plan would also address the County's concerns with geographic diversity. The use of single-member district guarantees that all regional interests, as defined by the County's districting scheme, will have candidates standing in the general election. After a general election based upon cumulative voting, at least three of the five districts will be represented on any given Board. Moreover, if a particular region or municipality desires representation, it is assured of two candidates in the general election and it will be able to successfully elect a Commissioner as long as at least 17% of the County electorate is so committed. [26]

The plan imposed by the Court best achieves the Fourth Circuit's mandate and adheres to the requirements of the Voting Rights Act and the political will of Worcester County. African-American voters of the County will have an opportunity to elect a candidate of their choice, but that opportunity will not come at the expense of geographical diversity, the division of municipalities, or racial segregation. Coalitions of voters will be free to cast their ballots on the basis of race, region, political issue, or any other consideration and have a real chance of electoral

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independents while 50% of white voters are Democrats, 40% are Republicans, and 10% are independent. (The record also indicates that, while those percentages are relatively constant for African-Americans, whites are increasingly voting Republican.) Based on these number, African-American Democrats would have a 14% majority in the Democratic primary in District 3.

[25] The plaintiffs have stated that they fear that the Court's plan may be too complicated. In fact, the plan is similar to Bill 93-6 and the County's invalidated electoral system in that it combines elements of both a single-member and at-large electoral system. Like the County's prior system, the Court's plan requires citizens of the County to recognize district boundaries while allowing the voters to have a voice in all Board races.

[26] *See, Cane v. Worcester County*, 847 F.Supp. at 372.

success while Board members will still be beholden to every County citizen.

The County has urged the Court to give sufficient time to allow officials to implement the new electoral system, to allow candidates to campaign, and to ensure that citizens are informed of the new electoral system and the candidates they are to select from. In deference to this request and the dictates of Maryland law, the election for Board of Commissioners will be held no later than November 7, 1995.

The Court will retain jurisdiction to ensure that the terms of the Order are complied with and to provide assistance to the parties if necessary.

SO ORDERED.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civ. No. Y-92-3226.

Honiss W. CANE, Jr., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

DATE: Feb. 21, 1995.

MEMORANDUM OPINION

YOUNG, Joseph H., Senior United States District Judge.

On January 6, 1995, the Court ordered Worcester County to adopt the electoral system described in the Court's Opinion.[1] The plaintiffs filed a motion for modification of the judgment and the defendants ("County") filed a motion for a stay pending appeal.

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[1] The United States Supreme Court denied Worcester County's writ of certiorari, *Worcester County, Maryland v. Honiss W. Cane, Jr.*, No. 94-995, — U.S. —, 115 S.Ct. 3616, — L.Ed.2d — (1995), thereby letting stand the Fourth Circuit's affirmation of the Court's finding of a Voting Rights Act violation.

A stay pending appeal is appropriate if the party seeking the stay can show that: 1) it will likely prevail on the merits of the appeal, 2) it will suffer irreparable injury if the stay is denied, 3) the other parties will not be substantially harmed, and 4) the public interest will be served by granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir.1970). The County asserts that a stay is warranted because each of these requirements has been satisfied.

The County alleges that it will likely succeed on the merits of its claim on appeal because the Court did not sufficiently defer to the County's legislative choices, the Court's remedy was not narrowly tailored, and elections in 1995 would be inappropriate. The County first claims that the Court failed to give due deference to the County's expressed rejection of cumulative voting as part of a remedy, but it spurned all electoral remedies except those that it proposed, all of which were found to be legally inadequate.[2] The Court thus had no choice other than to impose the rejected plan that it found best satisfied the underlying policy choices expressed by the County.[3]

The County asserts that its proposed electoral Plan # 2 was an adequate remedy that should have been accepted by the Court and will likely be accepted on appeal. Specifically, the County argues that Dr. Ronald Weber's testimony that African-Americans would have a functional majority in District 3 of Plan # 2 was uncontradicted and therefore dispositive. It claims that the Court further erred by assuming that all eligible voters do vote and by considering average crossover voting rates rather than those in specific elections.

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[2] Indeed, prior to the issuance of the Opinion of January 6, 1995, the County indicated that it would appeal whatever electoral system the Court ultimately imposed.

[3] These considerations are described in the Court's Opinion of January 6, 1995.

Dr. Weber was not contradicted by expert testimony at the hearing but was challenged on cross-examination. That cross-examination revealed that Dr. Weber failed to consider African-American crossover rates when evaluating the likelihood of African-American electoral success in District 3. When questioned about African-American crossover rates in the Purnell election,[4] the election that the County urged the Court to consider as the model for African-American electoral success when a "good" African-American candidate runs, Dr. Weber could not recall the figure. A review of Dr. Weber's report in the record reveals African-American cross-over voting to have been at 38.2% in the Purnell election, while the rate for white cross-over voting was 32.2%. In other words, an African-American candidate stands less chance based on crossover figures from the Purnell election than based on average crossover rates.[5]

The County further claims that the Court incorrectly assumed that all eligible voters do vote, but that assumption was for the benefit of the County. The only meaningful statistical data in the record indicates that 77% of eligible white voters register to vote in Worcester County while 32% of African-American eligible voters do so. If the Court had used those figures, the County's claim of a functional African-American majority in District 3 would have been less credible than assuming that all eligible voters do vote.[6] Dr. Weber did testify that when an African-American candidate runs in a district that is predominately African-American, participation rates are higher for African-Americans than for white voters. Not only is this claim irrelevant to District 3, as African-Americans would still be in a statistical minority, it is

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[4] Purnell, an African-American, ran for election to the Board in 1986 against a white candidate.

[5] On average, African-American voters crossover at essentially the same rate as white voters, whereas African-Americans voted for the white candidate significantly more than white voters opted for Purnell.

[6] The County concedes that participation rates are relevant to a determination that a given population is a functional majority.

wholly unsupported by any data and is directly contradicted by the information available in the record.

The County had ample opportunity to present statistical models based on actual data to prove that African-Americans had a fair chance at electoral success, *i.e.* a functional majority, in District 3, but they failed to do so. Unsupported assertions of an expert are not compelling when exposed upon cross-examination and thoroughly contradicted by the record.

The County also points to precedent allegedly rejecting cumulative voting as an acceptable remedy to support its claim of a likelihood of success on the merits on appeal. First, it claims that *McGhee v. Granville County*, 860 F.2d 110 (4th Cir.1988), rejected a proportional representation system analogous to cumulative voting. The system was rejected, but not because it was invalid. Rather, the system proposed by the county was found to be a legally acceptable remedy, and the Fourth Circuit found that the district court should have accepted the county's plan. *Id.* at 115. *McGhee* is not relevant to this case, because the County's proposed plans were legally unacceptable.

The County also cites *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994), to support its claim that the Court's imposition of an electoral system based in part upon cumulative voting may be overturned on appeal. The court in *Nipper* did reject cumulative voting specifically in the context of judicial elections, finding that cumulative voting might "fuel the notion that judges were influenced by race when administering justice." *Id.* at 1546. The court asserted no broad-based rejection of cumulative voting, and indeed it recognized that such a system "preserve[s] linkage and avoid[s] many of the concerns accompanying a subdistricting plan...." *Id.* A finding that a particular voting scheme in one context is inappropriate clearly does not preclude its use in an entirely different circumstance.

The County claims that the Court's remedy was not narrowly tailored because the "remedial goal in this case ... was not to restructure the County's electoral system into a system of proportional representation, but rather to insure equal electoral opportunity as required by § 2." The County failed to offer a legally acceptable remedial plan and rejected the plans presented by the plaintiffs. As noted above, the Court had no choice but to impose a plan that best addressed the policy concerns expressed by the county and the legal requirements of the Voting Rights Act. There was no more narrowly tailored, legally adequate remedy available.

Finally, the County claims that it has a likelihood of success on the merits because the Court's order of an election in 1995 was inappropriate. The County cites *United States v. City of Houston*, 800 F.Supp. 504 (S.D.Tex.1992), *Gjersten v. Board of Election Commissioners*, 791 F.2d 472 (7th Cir.1986), and *Hamer v. Ely*, 410 F.2d 152 (5th Cir.1969), as standing for the proposition that special elections should only be ordered in the most extreme cases. These cases are entirely irrelevant, however, as each involves the setting-aside of an election and subsequent special election after a finding that voting rights had been violated. The Court has not ordered that any election be set-aside, and it has not ordered a special or additional election. The 1994 election for the County Board was delayed by this litigation, and the Court ordered that the delayed election take place at the earliest possible date. It would be far more extreme to order a further delay in a regularly scheduled election than to require that the election be delayed or cancelled altogether.

The County asserts that the plaintiffs will not suffer substantial harm because the only effect of a stay, assuming an unsuccessful appeal, is that elections will not be held until November, 1996. However, the Court finds the harm to be far more significant than the County asserts. This case is about the denial of African-Americans of a meaningful right to vote. The County now urges the Court to not only delay African-Americans'

first access to fair elections in Worcester County, but also to delay to all citizens of the County their right to a voice in their government. This is a significant harm. Moreover, the County's assertion that *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir.1979), warns against the denial of a stay which will "utterly destroy the status quo" is irrelevant when, as here, the status quo has already been found to be illegal.

The County asserts that the public interest will be harmed by the refusal to grant a stay because, if the appeal is successful, money will have been wasted. The public's interest in timely and fair elections is substantially greater than the expense of establishing an electoral system that may later be held invalid.

Similarly, the irreparable injury that the County will allegedly suffer is that it will have to implement a new electoral structure before the Fourth Circuit will rule on the County's appeal. However, implementation of the County's Plan # 2 would have required a new electoral structure to have been put in place prior to the time that the Fourth Circuit would have ruled on the plaintiffs' appeal. The County's reliance on *Wise v. Lipscomb*, 434 U.S. 1329, 98 S.Ct. 15, 54 L.Ed.2d 41 (1977), is misplaced because any remedy chosen would have been a break from the residency district/at-large system used previously by the County. The irreparable injury argument is thus reduced to a claim that the time and expense of implementing a new system will have been wasted if the proposed plan is found invalid. Such an injury is not irreparable and is greatly outweighed by the continued denial of the voting rights of the citizens, of all races, of Worcester County by delaying the 1994 election.

For the same reason the Court will not delay the implementation of the new electoral system to modify the judgment or hold a fairness hearing as requested by the plaintiffs. African-Americans have a significant majority in the Democratic party in the Court's remedial district. African-Americans have thus

been given a fair opportunity at electoral success under the terms of the Voting Rights Act.

ORDER

In accordance with the attached Memorandum, it is this 21st day of February, 1995, by the United States District Court for the District of Maryland, Ordered:

1. That Plaintiffs' Motion for Modification of Judgment or to Schedule a Fairness Hearing BE, and the same IS, hereby DENIED,

2. That Defendants' Application for a Stay of Order Pending Appeal BE, and the same IS, hereby DENIED,

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1122

Honiss W. CANE, Jr.,

Plaintiff-Appellee,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom; Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellants,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

No. 95-1688

Honiss W. CANE, Jr.,

Plaintiff-Appellant,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom, Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellees,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

Argued June 5, 1995.
Decided June 16, 1995.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CA-92-3226-Y)

Before WILKINS, NIEMEYER, and WILLIAMS, Circuit Judges. AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

PER CURIAM:

Presently before us are appeals from the judgment of the district court imposing a remedial plan for electing members to the Worcester County, Maryland, Board of Commissioners and ordering a general election under this plan in November 1995. We modify the decision in part and remand with instructions.

I.

Plaintiffs brought this action in November 1992, alleging that the at-large system employed for electing County Commissioners violated § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. *See* 42 U.S.C.A. § 1973 (West 1994). Following a bench trial, the district court ruled that the at-large electoral scheme violated § 2 by impermissibly diluting the votes of African-Americans. Specifically, the district court found that Plaintiffs had carried their burden of demonstrating that the African-American

voters of the County were sufficiently large and geographically compact to constitute a majority in a single-member district and were politically cohesive; that the majority voted sufficiently as a bloc usually to defeat the candidate preferred by the minority; and that, based on the totality of the circumstances, the system for electing County Commissioners interacted with past and present discrimination to deprive the African-American voters of the same opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice. *See Cane v. Worcester County, Md.*, 840 F.Supp. 1081 (D. Md.1994).

The district court then requested that the County propose a remedial plan. The plan suggested by the County was the one it had adopted during the pendency of this action in the district court, and was virtually identical to the electoral scheme held by the district court to be violative of § 2. Concluding that this plan was inadequate because it was violative of § 2, the district court ordered that the County implement a system of cumulative voting. *See Cane v. Worcester County, Md.*, 847 F.Supp. 369 (D. Md.1994).

Last year, in the County's appeal from this decision, we affirmed as not clearly erroneous the ruling of the district court that the at-large electoral system violated § 2. However, we vacated the cumulative voting scheme crafted and ordered by the district court as a remedy for the § 2 violation and remanded. We concluded that because the district court, after finding the plan then in effect to be in violation of § 2, had immediately ordered the implementation of a cumulative voting scheme, it had deprived the County of an adequate opportunity to submit a remedial plan. Moreover, we held that the district court had failed to defer appropriately to the legislative preferences expressed by the County for its voting scheme. *See Cane v. Worcester County, Md.*, 35 F.3d 921 (4th Cir.1994), *cert. denied*, 115 S.Ct. 1097 (1995).

On remand, the district court afforded the County another opportunity to propose a remedial plan, and the County offered three plans. The plan that was the principal focus of the

proceedings below divided the County into five single-member districts in which candidates ran head-to-head for election among only the voters of their district in both the primary and general elections. Although none of the districts created by this plan would contain a majority African-American population, the County maintained that the plan remedied the § 2 violation because African-American voters would possess a "functional majority" in District 3, where the African-American voting age population was 44.68%. This is so, the County maintained, because with its projected white crossover vote, African-Americans in District 3 typically could elect the candidate of their choice. The district court noted that to remedy a vote dilution violation, the minority generally is given a super-majority and that no remedial plan relying upon projected white crossover voting had ever been approved. However, the court concluded that even if it were proper to consider projected white crossover vote in determining the adequacy of the proposed remedial plan, the projected level of white crossover voting would not provide African-American voters with a reasonable opportunity to elect their preferred candidate.[1]

Having held that none of the remedial plans offered by the County were acceptable, and having rejected the plan proposed by Plaintiffs that offered a 62% African-American voting age population in one of five single-member districts, the district court again fashioned its own remedy. It ruled that primary elections would be conducted using the electoral districts submitted in the County's second proposed remedial plan and that the general election would be conducted on a countywide basis using cumulative voting. The court further ordered that a general election

[1] The first plan submitted by the County on remand was, with some modifications of district boundaries, essentially the same as the County's original at-large scheme, and the district court properly rejected it as violative of § 2. The third plan submitted by the County was similar to the one described above (second plan), except that modifications of district boundaries resulted in African-Americans comprising only 33.6% of the voting age population in the district with the largest minority population; the district court rejected this plan on the same grounds that it rejected the County's second proposed plan. On appeal, the County does not seriously contend that either of these plans is viable.

under the new plan be conducted no later than November 7, 1995. *See Cane v. Worcester County, Md.*, 874 F.Supp. 687 (D. Md.1995); *Cane v. Worcester County, Md.*, 874 F.Supp. 695 (D. Md.1995).

II.

At oral argument, all parties urged that we reject the cumulative voting scheme imposed by the district court and agreed that the plan imposed by the district court should be vacated. However, the parties disagree over the appropriate course on remand.

The County first asserts that the second proposed remedial plan it submitted was adequate and that we should order the district court to implement it. We have no difficulty in rejecting this assertion and affirming on the reasoning of the district court that this plan is violative of § 2.

The County next claims that we should remand with instructions that it be given an additional 90 days in which to attempt to formulate a new plan. It maintains that this alternative relief is appropriate because it was not given an adequate amount of time in which to develop a remedial plan since the district court ordered that it submit a plan within ten days after this court denied the County's petition for rehearing and suggestion for rehearing en banc.

The County has been given more than a sufficient opportunity to submit a remedial plan that would satisfy § 2. The district court requested that the County provide a remedial plan in January 1994 during the initial proceedings below, and the County was given another opportunity to submit a remedial plan following our prior remand. However, in the nearly 18 months following the determination of the district court that the at-large electoral scheme was violative of § 2, the County has failed to propose any

acceptable remedy. Moreover, the County does not represent to this court that an electoral plan could be formulated that would be acceptable to the County and that would remedy the violation. Rather, despite the fact that it has taken no steps toward developing such a plan during the five months since the district court ruled on remand, it requests that this court remand once again so that it may have yet an additional 90 days in which to attempt to do so.[2] Such a remand would inevitably delay the elections scheduled for November and is unwarranted in light of the County's ample opportunities to advance an acceptable remedial plan and its failure to offer any indication that such a remand would produce an acceptable remedial plan. We therefore decline the County's invitation.

Plaintiffs assert that because all of the parties are in agreement that the cumulative voting scheme imposed by the district court is unacceptable and because none of the remedial plans offered by the County are adequate, we should instruct the district court to impose the single-member district plan they submitted on remand. Although this plan satisfied several of the County's expressed legislative judgments--it guaranteed representation from throughout the County and provided African-American voters a fair and reasonable opportunity to elect candidates of their choice--the County opposed the plan because it divided into different districts the residents of three municipalities--a result the County sought to avoid. Alternatively, Plaintiffs request that we instruct the district court to adopt their alternative plan, which adequately remedies the § 2 violation, guarantees representation from throughout the County, and is closer to satisfying all of the legislative goals

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[2] During oral argument in July 1994 in the first appeal, the County sought the opportunity to present the district court with a single-member district plan. The County certainly cannot assert that it had no reason to believe that it was appropriate to attempt to develop such a plan between September 16, when we remanded to the district court and thus afforded the County that opportunity, and October 12, when this court denied the petition for rehearing and suggestion for rehearing en banc.

expressed by the County because it divides the residents of only two municipalities into different districts.[3]

The district court concluded in January of 1994 that the scheme for electing members to the Worcester County Board of Commissioners diluted the votes of African-American voters in violation of § 2 of the Voting Rights Act. Despite the affirmance of that decision by this court nearly one year ago, the African-American voters of Worcester County still have not been provided with a remedy for the violation, and the Commissioners elected under the impermissible electoral scheme continue to hold over in office. We are loath to again postpone the long-awaited November general election[4] and are convinced that Plaintiffs' alternative plan provides an adequate remedy for the § 2 violation and corresponds most closely to the legislative goals expressed by the County. Accordingly, we remand to the district court with instructions to direct immediate implementation of Plaintiffs' alternative plan so that the general election scheduled for November 1995 may proceed as scheduled. The mandate shall issue forthwith.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS

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[3] Plaintiffs refer to the plan set forth on page 75 of the Joint Appendix submitted to this court in the first appeal as its alternative plan.

[4] The deadline by which candidates must file to run is July 3, 1995.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1122

Honiss W. CANE, Jr.,

Plaintiff-Appellee,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom; Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellants,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

No. 95-1688

Honiss W. CANE, Jr.,

Plaintiff-Appellant,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom, Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellees,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

FILED: June 16, 1995.

ORDER

Appellants/cross-appellees have filed an application for stay and a renewed application for stay pursuant to Rule 8 of the Federal Rules of Appellate Procedure and the appellee/ cross-appellant has responded to the application for stay.

The Court denies the application for stay.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1122

Honiss W. CANE, Jr.,

Plaintiff-Appellee,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom; Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellants,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

No. 95-1688

Honiss W. CANE, Jr.,

Plaintiff-Appellant,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom, Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellees,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

FILED: June 16, 1995.

MANDATE

The judgment of this court dated 6/16/95 takes effect today.

BERT M. MONTAGUE
CLERK

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civ. No. Y-92-3226.

Honiss W. CANE, Jr., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

ORDER

In accordance with the Opinion issued by the United States Court of Appeals for the Fourth Circuit on June 16, 1995, it is this 28th day of June, 1995, by the United States District Court for the District Court of Maryland, ORDERED:

1. That defendants shall implement the single-member-district system proposed by plaintiffs, referred to as plaintiffs' Alternative Plan (dated October 1, 1993) as a system for electing the Worcester County Board of Commissioners. The 48 page listing of the census tracts and blocks for each of the five districts is attached to this order;

2. That pursuant to this single-member-district plan, defendants shall conduct the primary election in September, 1995, and the general election in November, 1995, for the election of the Worcester County Board of Commissioners;

3. That July 3, 1995 shall remain as the candidate filing deadline for these elections;

4. That the terms of the Commissioners elected under this plan extend until the swearing in of the next duly elected Commissioners in November, 1998; and

5. That a copy of this Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1122

Honiss W. CANE, Jr.,

Plaintiff-Appellee,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom; Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellants,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

No. 95-1688

Honiss W. CANE, Jr.,

Plaintiff-Appellant,

v.

WORCESTER COUNTY, Maryland; George M. Hurley; John E. Bloxom, Reginald T. Hancock; Floyd F. Bassett; Jeanne Lynch, Members, Worcester County Board of Commissioners,

Defendants-Appellees,

and

George H. DRYDEN; Hinson Finney; Mark Frostrom,

Defendants.

UNITED STATES of America; Center for Voting and Democracy; Republican National Committee,

Amici Curiae.

FILED: June 16, 1995.

ORDER

Appellants have filed a motion to recall and stay the mandate.

The Court denies appellants' motion to recall the mandate and application for stay of reissuance of mandate pending petition for writ of certiorari.

Entered at the direction of Judge Wilkins with the concurrence of Judge Williams. Judge Niemeyer would grant the motion and remand the case to the district court for further proceedings in light of the Supreme Court's decision in *Miller v. Johnson*, 63 U.S.L.W. 4726 (June 29, 1995).

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX L

42 U.S.C. § 1973
VOTING RIGHTS ACT OF 1965, AS AMENDED AND EXTENDED BY THE 1982 VOTING RIGHTS ACT AMENDMENTS
SECTION 2

§ 1973. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134).

APPENDIX M

Excerpt from Cross-Examination of William Cooper Volume 2

* * * *

[137][By Mr. Griffith, co-counsel for the County]: Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed majority-minority district], would it be fair to say that what you have done is, you have linked together the black concentrations in these three non-contiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?

By Mr. Cooper: Well, obviously, that's what we've done.

* * * *

Excerpt from Direct Examination of John Bloxom Remedial Hearing, 12/2/94

* * * *

[162] In developing our plans, as I said, we tried to keep the towns intact and we centered the district on Berlin. But in forming that district, in forming the -- in forming that functional majority district is, in my opinion, solely based on race.

* * * *

[166] Q [By Mr. Griffith, co-counsel for the County]: Has the County consciously engaged in some degree of race based or racially conscious boundary drawings in Plans Two and Three?

A: Well, you had to.

Q: Why?

A: Because the Court has said you have to, you know.

* * * *

Excerpt from Direct Examination of William Cooper
Volume 2

* * * *

[123] Q [by Mr. Brown, co-counsel for plaintiffs]: Let me show you what's been marked as Plaintiffs' Exhibit Number 4, and ask if you would please identify that for us?

A: This is a second draft of a five district plan that I prepared at your request. It creates a majority black district with a 65.1 percent black population and a 62.1 percent black voting age population. . . .

[123-24] Q: Now, there came a time later on, did there not, when I asked if you would put your hand at drawing another district, which we've been referring to as our second proposal, and that has been premarked as Exhibit 5, Plaintiffs' 5? And I ask you, would you please identify what's been marked as Plaintiffs' 5?

A: This is a second proposal that I developed. I was asked to see if we could produce a plan that was a little more compact, maybe. In this instance, we did not include Pocomoke City . . .

* * * *

Excerpt from Transcript of District Court Remedial Hearing

* * * *

[4] [By Mr. Griffith, co-counsel for the County]: [T]he defendants, by submitting remedial plans, are responding to the Court's directive. . . . In so doing, the defendants, the Worcester County Board of Commissioners, do not concede the Section Two liability issues [and] do not concede the presence of the *Gingles* preconditions . . .

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No. 95-270

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WORCESTER COUNTY, MARYLAND, *et al.*,
Petitioners,

v.

HONISS W. CANE, JR., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit erred by employing a traditional single-member-district electoral plan, including one remedial district with a narrow black-majority population, to remedy the vote dilution violation resulting from Worcester County's at-large electoral scheme?

2. Whether the Fourth Circuit erred by not analyzing in detail a remedy rejected by both parties and by rejecting the County's request for a remand causing further delay?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-respondents, black voters of Worcester County, Maryland, filed this class action in November 1992 challenging the at-large, designated-post election system used to elect county commissioners. Despite Worcester's one-fifth black population, never in the County's 253-year history has an African-American candidate been elected to any public county office. The black voters showed that this absolute

exclusion of African Americans resulted from interaction between Worcester's at-large election system, racially polarized voting, and social and historical conditions.

Following a trial in November 1993, the district court held for the plaintiffs, ruling that Worcester's at-large system diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In keeping with the three-pronged *Gingles* test, the trial court found first that the County's black population is sufficiently large and geographically compact to form a majority in a single-member district. Pet. App. 5a-7a. It and the court of appeals agreed that the plans introduced by plaintiffs to illustrate proof of *Gingles* factor one comported with traditional districting principles, did not rely upon districts that were geographically bizarre, and appropriately recognized communities of interest. Pet. App. 7a; 38a-39a, n.6.

Second, the court found that black voters in Worcester County are politically cohesive, usually voting for black candidates in elections in which black candidates run for office. Pet. App. 7a-11a. In contrast, white Worcester voters rarely support black candidates, thus demonstrating white bloc voting sufficient to defeat black candidates of choice and to satisfy *Gingles* factor three. The district court found that on average no more than 19 percent of white voters support black candidates. Pet. App. 14a. Petitioners do not dispute the court's findings with respect to either black political cohesion or white bloc voting, conceding that voting is

racially polarized in Worcester County, in satisfaction of *Gingles* factors two and three.

Beyond the three *Gingles* factors, the district court assessed the array of factors set out by the Senate as pertinent to analysis of a Section 2 claim. S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. The court made extensive findings regarding the "totality of the circumstances" that bear upon racial politics in Worcester County, including:

- the uninterrupted exclusion of African-American candidates from public office, Pet. App. 14a;

- the County's use of a candidate residency district system -- akin to an anti-single-shot provision -- an electoral feature that "aggravates the political disadvantage of the County's minorities," Pet. App. 14a;

- historical and continuing patterns of racial discrimination, as evidenced by state and local disenfranchisement schemes such as literacy tests and property ownership requirements for voters and candidates; white voters' overwhelming past support -- lasting into the 1970s -- for racist and segregationist candidates and causes; *de jure* segregation of schools, universities,

and public accommodations through the 1960s; and racial segregation of fraternal organizations, churches, and private social life continuing into the present;

- the present-day legacy of past racial discrimination manifested in gross socioeconomic disparities between black and white citizens and severe racial disparities in voter registration and turnout rates. As of 1990, the trial court found, the voter registration rate for white Worcester Countians was 77 percent, but only 32 percent for black Worcester residents. Pet. App. 50a.

Based upon its collective findings, the district court concluded that Worcester's at-large, designated-post system "interacts with past and present discrimination to deprive African-Americans of Worcester County [of] the same 'opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice.'" Pet. App. 15a-16a, *quoting* 42 U.S.C. §1973(b). Upon review, the Fourth Circuit affirmed the district court's ruling that Worcester's at-large system violated the Voting Rights Act. Pet. App. 38a. This Court denied the County's petition for certiorari. Pet. App. 44a.

A lengthy dispute followed concerning the remedy appropriate for Worcester's Section 2 violation -- characterized by the County's refusal to cooperate in the

remedial process, Pet. App. 70a & 71a, and featuring two County appeals and a stay of 1994 elections obtained by the County. In deference to the asserted preferences of the County Commissioners, the courts adopted a traditional single-member district plan, narrowly tailored to address the violation.[1] Pet. App. 71a-72a. At the direction of the Fourth Circuit, on June 28, 1995 the district court ordered this plan into place. Pet. App. 78a-79a. Worcester County's subsequent motion for recall of the Fourth Circuit mandate was denied, Pet. App. 81a-82a, and on August 15 Chief Justice Rehnquist denied the County's motion to stay the Fourth Circuit mandate.

Elections -- postponed since August 1994 -- currently are proceeding under the new scheme: the primary elections took place on September 12, 1995; the general election will be held on November 7, 1995.

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[1] Plaintiffs had proposed two five-member district plans, one including a remedial district with 62.1% black voting age population (VAP) and one with a 57.8% black VAP district. Although the plaintiffs preferred the 62.1% plan, the courts adopted the 57.8% plan based upon the Fourth Circuit's finding that that plan was more narrowly tailored to achieve compliance with the Voting Rights Act. Specifically, the court stated that the 57.8% plan "adequately remedies the §2 violation, guarantees representation from throughout the County, and is closer to satisfying all of the legislative goals expressed by the County" than the plaintiffs' preferred plan. Pet. App. 71a-72a.

SUMMARY OF ARGUMENT

The Fourth Circuit's unpublished, *per curiam* decision does not present any issue of "overriding national importance" as grandiosely contended by petitioners. Rather, the decisions below apply established precedent to evaluate a basic vote dilution claim and adopt a traditional remedy narrowly tailored to address the vote dilution violation. Worcester County seeks to have this Court review and disturb the detailed factual findings entered by the district court and affirmed by the Fourth Circuit on appeal. Because it is not the general practice of this Court to engage in individualized case evaluation or to review factual findings concurred in by two courts below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. NO SPECIAL OR IMPORTANT REASON FOR THE ISSUANCE OF A WRIT OF CERTIORARI EXISTS AS REQUIRED BY RULE 10

This case presents a garden variety challenge to racial discrimination in Worcester County's political system. It presents no issue under the Voting Rights Act that is significant or novel, or which merits plenary review by this Court. Moreover, because the Fourth Circuit ruled by unpublished opinion, the effect of the ruling is limited to the individual parties before the Court. No legal precedent has been established. A grant of certiorari would serve only to engage the Court in individualized case review, something it has previously declined to do in this case. Pet. App. 44a

(denying County's petition to review court of appeals' decision that at-large method of elections violated Section 2).

A. The Rulings of the Courts Below Were Based Upon Correct Legal Standards

The district court analyzed the plaintiffs' vote dilution claim as directed by this Court in *Thornburg v. Gingles*. The court of appeals affirmed the district court's analysis and conclusions. Worcester County has pointed to nothing extraordinary about application of *Gingles* to the facts of this case, nor does it contend that any of the findings of fact are clearly erroneous.[2]

Instead, petitioners' basic contention is that *Gingles*' Section 2 analysis is now unconstitutional in light of *Miller v. Johnson*, 115 S.Ct. 2475 (1995). According to petitioners, because plaintiffs took race into account in complying with the first *Gingles* precondition, their "entire case rests on plans that violate *Miller*." Pet. 14. The petitioners are mistaken. *Miller* did not alter Section 2 vote dilution analysis nor the *Gingles* standards. Rather, *Miller* reemphasized the holding in *Shaw v. Reno* that equal protection challenges to redistricting are "'analytically distinct'" from vote dilution claims. *Miller*, 115 S.Ct. at 2485, *quoting Shaw*, 113 S.Ct. at 2830.

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[2] The County does make a "clearly erroneous" argument with respect to remedy, but, as noted infra, it is plainly without merit.

That distinction is readily apparent. The action of a legislature in adopting a redistricting plan in which race is the predominant factor and in which all traditional redistricting principles are subordinated to race is vastly different from the actions of a plaintiff in presenting, and a court in resolving, a complex Section 2 challenge. A plaintiffs' Section 2 case never rests entirely on the construction of a race conscious redistricting plan. The construction of a plan which contains a majority-minority district is merely a precondition (moreover, it is only one of three preconditions) that a plaintiff usually must satisfy before a court may conduct the totality of circumstances analysis required by Section 2. Petitioners are simply wrong in claiming that plaintiffs' "entire case" rests on a race conscious redistricting plan.

Plaintiffs' case rests, instead, upon a myriad of factors showing that the existing system dilutes minority voting strength. It rests upon detailed findings of vote dilution by the lower courts, none of which petitioners contend are clearly erroneous. The heavy handed attempt to equate the complex totality-of-circumstances analysis required by Section 2 with the kind of redistricting condemned in *Miller* is unavailing.[3]

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[3] In the instant case the courts below had no occasion to consider state interests supporting any particular remedial plan, because the County, being opposed to any remedy, advanced no interests to support a remedy. Nevertheless, the record is clear that there exist in Worcester County the most compelling reasons one could present for race-conscious districting: to overcome two and a half centuries of pervasive racial discrimination and to provide black voters a fair opportunity to elect a candidate of their choice for the very first time.

This Court unanimously rejected an argument similar to that raised by Worcester County in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). In *Voinovich*, the district court concluded that "§2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 113 S.Ct. at 1156. The Court disagreed. It held that Section 2 contains "no *per se* prohibitions against . . . majority-minority districts," and approved the *Gingles* requirement that Section 2 plaintiffs "must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" *Id.* at 1157.

In *Holder v. Hall* seven members of the Court, either explicitly or by necessary implication, rejected Justice Thomas's argument that the Court's Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598. *Id.* at 2588 ("*Stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of §2")(O'Connor, J., concurring in part and concurring in the judgment); *Id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us")(Blackmun, J., dissenting); *Id.* at 2627("[i]t is crystal clear that Congress intended the 1982 amendment to cover non-access claims like those in *Bolden* and *Gomillion*")(Stevens, J., dissenting); *Id.* at 2585 ("[i]n a §2 vote dilution suit . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice")(Kennedy, J., plurality opinion). In vote dilution challenges such as this, that benchmark may properly be a system containing one or more majority-

minority districts. *Id.* at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

More recently, the Court affirmed the validity of Section 2 and the *Gingles* analysis. It made clear in *Dewitt v. Wilson*, 115 S.Ct. 2637 (1995), decided the same day as *Miller*, that it is constitutionally permissible for legislatures to consider race as one among several factors in redistricting decisions -- even without compelling cause. Not only is Worcester's extremist reading of *Miller* inconsistent with *DeWitt*, but it would wreak havoc on representative government nationwide, casting doubt upon the validity of districted election plans in place at every level of government.

Here, as in *DeWitt*, race was merely one among several factors taken into account in development of the plaintiffs' proposed remedial plans. The courts below have repeatedly rejected the County's claim that Worcester's new single-member-district plan raises concerns about "racial gerrymandering." In sharp contrast to the Georgia congressional district at issue in *Miller*, the district plan in this case was characterized by a unanimous Fourth Circuit panel as closely aligned with traditional districting principles and as consistent in shape with the County's old residency districts. Pet. App. 38a-39a n.6. The plan adheres to "the historical north-south division of the County and the natural boundaries created by County waterways." *Id.* Perhaps most significant is the appellate court's finding that the district recognizes a distinctive "community of interest" heretofore denied recognition by Worcester County.

> [T]he uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. . . . Drawing districts based upon such common interests is perhaps one of the most often invoked districting principles.

Id., *citing Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). *Miller* expressly approved such districting that fosters "respect for . . . communities defined by actual shared interests." 115 S.Ct. at 2488.

The County's contention that *Miller* bars voting rights plaintiffs and courts from taking race into account when establishing proof of the first prong of *Gingles* is plainly frivolous. *Gingles* requires plaintiffs in Section 2 cases to take race into account by establishing that it is possible to create majority-minority districts. To accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution.

B. The Court of Appeals Engaged in Correct Decisional Procedures in Resolving this Case

The County also seeks review of the adequacy of the processes employed by the Fourth Circuit in its June 1995 resolution of this case. The County claims that the appeals court erred by (i) failing to fully articulate its reasons for rejecting the district court's remedy for the primary elections

and (ii) ordering implementation of a districting plan ("Plan B") without further delaying the election to permit the district court a greater opportunity to reexamine it. Pet. 17-19. Not only are these issues inappropriate for review by this Court, but the County is also wrong on their merits.

First, because the court of appeals chose not to publish its opinion, it deemed its issues not to be noteworthy. 4th Cir. I.O.P. 36.4. Furthermore, its unpublished status will preclude it from having any broad precedential effect. *Id.*, I.O.P. 36.6. Thus, the methodology by which it produced the unpublished opinion presents no issue of broad import that would be appropriate for this Court's review.

Second, at oral argument neither party supported either part of the district court's remedy (a system of single-member-district elections for the primary and cumulative voting for the general election). Pet. App. 70a. The County, therefore, waived any claim with respect to the method employed by the court of appeals in rejecting that plan.

Finally, at the liability stage the district court had fully examined Plan B, which the court of appeals ultimately ordered. Pet. 19 n.19. Thus, it had been "out on the table" and evaluated by all. This plan was not as favorable to plaintiffs as their primary proposal ("Plan A"). The court of appeals deferred to the County's professed legislative goals by rejecting Plan A for Plan B. Having failed to proffer a viable alternative, Pet. App. 70a, the County can hardly complain that the court of appeals ordered the one plan of the only two

viable plans submitted that best accommodated the County's goals.

As a review of the court of appeals' decision makes clear, even on the day of oral argument, the County was still seeking inappropriately to further delay the electoral process. Because the court of appeals determined that a remand to permit further district court review of Plan B would only unnecessarily delay an election that had already been delayed a year, its finding that further delay was "unwarranted" was most reasonable. Pet. App. 71a. At the very least, its equitable assessments pose no certiorari issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In their Petition for a Writ of Certiorari ("Pet.") Petitioners Worcester County, Maryland, *et al.* ("the County") demonstrated that the decisions below conflict with this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). Specifically, the County showed that the Fourth Circuit erred in holding that the County's at-large electoral system violated § 2 of the Voting Rights Act ("VRA") of 1965 *as am.*, 42 U.S.C. § 1973 (1994 Supp.), based on a plan offered by Respondents that subordinated traditional districting principles to racial considerations. *See* Pet. 10-17. The County also showed that the Fourth Circuit erred in failing to apply the "clearly erroneous" standard of review, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and in substituting its judgment for the district court's by directing implementation of a districting plan that the district court never considered as a possible remedy. *See* Pet. 17-19. In light of these conflicts, and the overriding national importance of the issues presented, the County asked this Court to grant certiorari to review the decisions below.

Respondents rebut none of the County's showings. Rather than acknowledge the conflict between the decisions below and *Miller*, Respondents mistakenly characterize the Petition as an attack on the validity of § 2 and *Gingles*, suggesting that the County would prohibit any use of race in redistricting. Respondents' Brief in Opposition ("Opp.") 6-11. Rather than defend the Fourth Circuit's failure to apply proper standards of appellate review, Respondents instead cite the Fourth Circuit's decision to withhold publication of the opinion. Opp. 11-13.

Respondents' arguments have no merit, and thus present no bar to this Court's grant of certiorari. The Court should therefore grant the Petition.

I. RESPONDENTS HAVE NOT REBUTTED THE COUNTY'S SHOWING THAT THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *MILLER*

The County demonstrated that the decisions below contradict *Miller* in two crucial aspects, and thus the plan ordered into effect by the court below is unconstitutional. Pet. 10-17. First, the Fourth Circuit applied the wrong standard in rejecting the County's arguments that Respondents' proposed district was unconstitutional. The Fourth Circuit held (in a footnote) that because the proposed majority-minority district was not "bizarre" and did not "ignore" traditional districting principles, it was constitutional. App. 38a n.6. Yet *Miller* holds that "bizarreness is [not] a necessary element of the constitutional wrong," 115 S. Ct. at 2486, and prohibits plans that *subordinate* traditional districting principles to racial considerations -- not just plans that *ignore* such principles. *Id.* at 2486-88 (majority opinion) and 2499-500 (Ginsburg, J., dissenting).

In addition, the district court justified Respondents' use of race, at the expense of the County's oft-expressed interests in countywide representation and preservation of municipalities, by finding that the plan "merely affirms the existing racial divisions within the County." App. 6a.[1]

[1] Respondents' assertion that "the County, being opposed to any remedy, advanced no interests to support a remedy," Opp. 8, is incorrect. The district court's first remedy opinion recognized that the County did have an interest in "allowing all the citizens to vote for all the candidates" (*i.e.*, countywide representation) and avoiding "divi[sion of] a municipality into two districts or combining two municipalities into the same district" (*i.e.*, preservation of municipalities). App. 24a, 25a. Respondents (Footnote continued)

Similarly, the Fourth Circuit affirmed, citing in part the "community of interest" of African-Americans within the County. App. 38a n.6. *Miller*, however, forbids the assumption that "individuals of the same race share a single political interest." 115 S. Ct. at 2487.

Respondents do not attempt to rebut the County's demonstration that race-conscious redistricting plans must comply with *Miller*. Instead, Respondents claim that "[P]etitioners' basic contention is that *Gingles'* Section 2 analysis is now unconstitutional in light of *Miller*." Opp. 7. Furthermore, they argue that "[t]o accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution." *Id.* at 11. Finally, they suggest that the County's arguments "bar[] voting rights plaintiffs and courts from taking race into account when establishing proof" of the *Gingles* preconditions. *Id.*

Respondents' arguments are wholly without merit. The County did not argue that *Miller* invalidates § 2 or *Gingles* or that *Miller* prohibits any use of race in redistricting. Instead, the County demonstrated that, as a result of *Miller*, racial considerations in redistricting cannot subordinate traditional districting principles. *See* Pet. 12.[2] Simply put, *Miller* does

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(Footnote continued)

themselves concede, *later in their brief*, that these same interests led the Fourth Circuit to impose Respondents' alternate plan ("Plan B") rather than the one advocated at the first remedy hearing. Opp. 12. It is therefore disingenuous for Respondents to suggest that the County never expressed any interests in support of a remedy.

[2] Consequently, *DeWitt v. Wilson*, 115 S. Ct. 2637 (1995), cited at Opp. 10, supports the County, not Respondents. In *DeWitt*, this Court approved the use of race as one among many

(Footnote continued)

not overturn *Gingles*, but instead places limits on the types of plans § 2 plaintiffs may offer to comply with *Gingles*. Accordingly, the County asked this Court to "clarify that at-large election systems do not violate the VRA when the only proof of a sufficiently numerous and geographically compact minority, which this Court in *Gingles* deemed a 'precondition[]' to § 2 liability, is a plan" that violates *Miller*. Pet. 11.

In fact, it is Respondents who seem to ask this Court to rewrite *Gingles* when they suggest that "[t]he construction of a plan which contains a majority-minority district is *merely* a precondition * * * that a plaintiff *usually* must satisfy before a court may conduct the totality of circumstances analysis required by Section 2." Opp. 8 (emphasis added). Compliance with *Gingles* is not simply something plaintiffs *usually* must do; it is a *"necessary precondition"* to § 2 liability. 478 U.S. at 50-51 (emphasis added); *Growe v. Emison*, 113 S. Ct. 1075, 1084-85 (1993) (holding that "[a]bsent proof of the *Gingles* preconditions, there neither has been a wrong nor can [there] be a remedy" and invalidating a judicially imposed majority-minority district where "the *Gingles* preconditions were not only ignored but were unattainable").[3] Thus, Respondents' reading of *Gingles'*

(Footnote continued)

factors to be considered in redistricting. Respondents' plan, on the other hand, was described *by their own expert* as being based primarily on racial considerations. Pet. 4, App. 84a. Consequently, Respondents' use of race is more similar to the racial gerrymandering condemned in *Miller* than the more balanced approach upheld in *DeWitt*.

[3] Indeed, *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), cited by Respondents, Opp. 9, reaffirms the rule that § 2 plaintiffs must satisfy *Gingles'* compactness precondition. 113 S. Ct. at 1157.

compactness requirement conflicts not only with *Miller*, but also with *Gingles* itself.[4]

Nor can Respondents distinguish this case from *Miller* by asserting that "the action of a legislature in adopting a redistricting plan [that violates *Miller*] is vastly different from the actions of a plaintiff in presenting, and a court in resolving, a complex Section 2 challenge." Opp. 8. This Court has made clear that federal courts have less freedom than legislatures in fashioning remedies for VRA violations. *See Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) ("federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law * * * But that does not mean that the States' powers are similarly limited" because "it is the domain of the States, and not the federal courts, to conduct apportionment in the first place") (internal citation omitted); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (court may only alter a legislatively enacted plan to the extent necessary to remedy VRA violation); *Shaw v. Hunt*, 861 F. Supp. 408, 434 n.21, (E.D.N.C. 1994) (three-judge court), *prob. juris.*

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[4] Even if the *Gingles* compactness requirement could somehow be overcome by a court's "detailed findings of vote dilution" resulting from a "complex totality-of-circumstances analysis," as Respondents suggest, Opp. 8, the district court's totality-of-circumstances findings were not "extensive," Opp. 3, or "detailed," Opp. 6, nor was its analysis complex. The district court's totality of circumstances analysis occupies only three paragraphs in its liability opinion, and consists of a cursory review of the history of state and local race relations, followed by a conclusory statement that the County's at-large electoral system violates the VRA. App. 14a-15a. This analysis is hardly "detailed" or "complex" enough to outweigh Respondents' failure to satisfy *Gingles*.

noted, 115 S. Ct. 2639 (1995). Thus, if a legislature cannot enact a plan that subordinates traditional districting principles to racial considerations, it follows that a federal court may not do so either.

In summary, Respondents' repeated attempts to characterize the County as hostile to existing voting rights law are at once incorrect and non-responsive. The Petition frames an issue of overriding national importance -- whether a court may apply § 2 of the VRA to overturn a local government's electoral system using redistricting plans that violate *Miller*. This issue is especially worthy of this Court's consideration, given that large numbers of local governments use the same electoral system as the County. *See Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994) (Thomas, J., concurring) (noting that 60% of cities nationwide use at-large electoral systems). This Court should therefore grant the Petition.

II. RESPONDENTS HAVE NOT REBUTTED THE COUNTY'S SHOWING THAT THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS FOR APPELLATE REVIEW OF VOTING RIGHTS CASES

The Petition also demonstrated that the Fourth Circuit applied the wrong standard of review and erroneously substituted its judgment for the district court's by directing implementation of a plan never presented to the district court as a possible remedy. Pet. 17-19. Respondents do not attempt to rebut this demonstration, but instead seek refuge in the Fourth Circuit's decision to withhold publication of its opinion. Opp. 12 (claiming that disposition by unpublished decision "preclude[s] * * * any broad precedential effect" and "presents no issue of broad import [] appropriate for this Court's review"). Respondents suggest further that the

County waived its procedural objections by failing to support the remedial plan that the Fourth Circuit invalidated. *Id.* Finally, Respondents assert that their "Plan B" (the plan the Fourth Circuit directed the district court to implement) had been placed "out on the table" during the district court's liability trial and, thus, was fully examined by the district court as a remedy. *Id.*

Once again, Respondents' assertions are without merit. Whether the Fourth Circuit deemed the issues sufficiently noteworthy to merit publication has no bearing upon the question of whether the appellate court applied the appropriate standard of review. As the County demonstrated, and Respondents' Brief in Opposition does not dispute, the Fourth Circuit's failure to review the district court's remedy opinion using the "clearly erroneous" standard conflicts with this Court's opinion in *Gingles*, 478 U.S. at 79. Furthermore, the decision conflicts with Fifth Circuit precedent requiring detailed findings of fact in § 2 cases. Pet. 18-19 n.18 (citing *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984)). Given the large number of jurisdictions that use at-large elections, *see Holder*, 114 S. Ct. at 2595, the Fourth Circuit's decision to withhold publication of the opinion should not preclude this Court's consideration of the important issues in this case.

Furthermore, Respondents' assertion that the County failed to support the district court's remedy in oral argument before the Fourth Circuit is incorrect. Although the County opposed the district court's decision to impose cumulative voting for the general election, the County affirmatively supported the district court's decision to use the single-member districting plan proposed by the County for the primary election. *See* Brief of Appellants/ Cross-Appellees Worcester County *et al.*, *Worcester County, et al. v. Cane, et al.*, Nos. 95-1122, 95-1688 at 23-31 (4th

Cir. April 12, 1995) (arguing that district court correctly imposed County's single-member districting plan for primary, but erred in failing to impose same for general election).

Finally, contrary to Respondents' assertions, Plan B was not "on the table" as a proposed remedy from the moment it was introduced at the district court's liability trial. In fact, Respondents *never offered Plan B* when the district court asked for proposed remedies.[5] Thus, if Plan B were ever "on the table" as a proposed remedy, as Respondents assert, they subsequently took it "off the table." Consequently, the district court never could have "fully examined" Plan B as a remedy.

In summary, Respondents' answers to the County's demonstration that the Fourth Circuit failed to apply the proper standards for appellate review are as flawed as those made in response to the County's constitutional objections. Respondents neither rebut the substance of the County's points nor make any other valid arguments. This Court should therefore grant the Petition.

CONCLUSION

The decisions below present issues of overriding national importance and conflict with decisions of this Court, and Respondents have failed to answer the points made in the Petition. Therefore, this Court should issue the writ to review the Fourth Circuit's use of a racially motivated single-member districting plan to invalidate and replace the County's at-large election system. Failing that, the Court should withhold its disposition of the Petition pending the

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[5] App. 23a (first remedial opinion; Respondents offer Plan A and cumulative voting system); App. 54a (second remedial hearing; Respondents offer Plan A).

decisions in *Shaw v. Hunt*, *supra*, and *Bush v. Vera*, *prob. juris. noted*, 115 S. Ct. 2639 (1995), which will likely shed further light on this case.

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Respectfully submitted,

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